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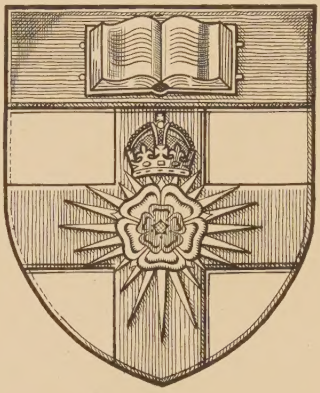

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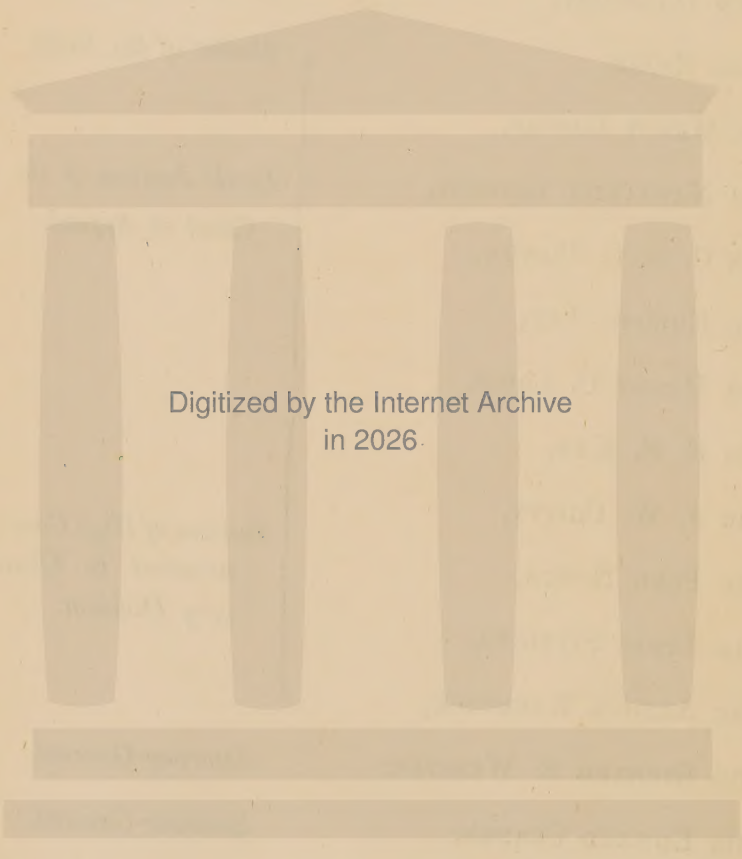

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Page	*Line*	*For*	*Read*
280	4	"*Crosthwaite* v. *Dean*"	"*Crossley* v. *Lightowler*"
,,	foot-note (2)	"5 Eq. 245"	"3 Eq. 279"
396	— 3	*delete the words* "and to the heirs male of the body of the first son lawfully issuing or issued."	
689	22	"*W. D. Rotch*"	"*P. O. Lawrence.*"

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re BRIDGEWATER NAVIGATION COMPANY.

C. A.
1887
NORTH, J.
Dec. 16.
1888
Jan. 16.
C. A.
1888
April 10, 11;
May 15.

[1887 B. 4549.]

Company—Articles of Association—Construction—Power to issue Preference Shares—Winding-up—Surplus Assets—Net Profits.

The memorandum of association of a company provided that the capital of the company should consist of 500 £1000 shares. Article 4 of the articles of association gave power to create additional share capital, which might be issued as preference shares. By special resolution under a power in the articles it was resolved that the 500 £1000 shares should be divided into 50,000 £10 shares, and that the capital should be increased by the creation of 80,000 new £10 shares. The company by special resolution repealed the original articles and substituted others, one of which was to the same effect as the original article 4. When 100,000 £10 ordinary shares had been issued, the company resolved that the balance of the unissued capital, namely, £300,000, should be issued as 30,000 new £10 shares with a preferential dividend:—

Held, by *North*, J., that the issue of such preferential shares by the directors was *intrà vires*.

The articles of association of a limited company provided that the entire net profits of each year, subject to providing a reserve, should belong to the holders of shares. After this preference shares entitling the holders to a fixed dividend were issued under a power in the articles. A statute enacted that the company should sell to another company its undertakings for a specified price, which left a large surplus after payment of liabilities and return of paid-up capital:—

Held, by *North*, J., and by the Court of Appeal, that the balance of the

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purchase-money, after satisfaction of the liabilities of the company and the return of paid-up capital, was not profit belonging solely to the ordinary shareholders, but was divisible between the holders of ordinary and preference shares in proportion to the amounts paid up on the shares.

THE *Bridgewater Navigation Company* was incorporated by registration in August, 1872. The objects of the company were to acquire and work certain canal undertakings. The memorandum of association provided that the capital should consist of £500,000 divided into 500 shares of £1000 each.

The articles material to the present application were:—Art. 4. "The company may, by the resolution of a general meeting, increase its capital beyond the amount mentioned in the memorandum of association by the creation of new shares of such amounts per share in the aggregate as such resolution shall direct, and any new capital so created may carry such preferential right to dividend, or such priority in the distribution of assets, or be subject to such postponement of dividends, or in the distribution of assets, as any resolution of a general meeting, passed previously to the issue of any such new capital, shall direct. But, save as specified in any such resolution, all new capital shall be subject to the same provisions in all respects as if it had been part of the original capital mentioned in the memorandum of association." Art. 6. "The shares or any class of shares may, from time to time, be consolidated into a smaller number of shares, or be divided into a larger number of shares, or the capital may be reduced by such proceedings and resolutions as required by law." Art. 92. "No dividend shall be paid except out of the profits of the company arising from the business of the company as shewn upon the balance-sheet, which shall from time to time have been examined and passed by the auditors." Art. 93. "The board may, in priority to any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund for effecting purchases, redeeming mortgages or rent-charges, wholly or in part repairing or maintaining works, plant, or other property, of the company, answering damages, or meeting any other contingencies or purposes of the company, and the board may invest the sum so set aside in or on such securities as they may select other than the shares of the company."

Art. 94. "Subject to the last preceding article, the entire net profits of each year shall belong to the holders of the ordinary shares; and the board may thereout, with the sanction of the company in general meeting, declare a dividend to be payable on those shares in proportion to the amounts paid up thereon."

At meetings of the company held on the 27th of September and the 11th of October, 1872, respectively, the following special resolutions were duly passed and confirmed. "(1.) That the capital of the company mentioned in the memorandum of association instead of being divided into 500 shares of £1000 each as fixed by such memorandum shall be and is hereby divided into 50,000 shares of £10 each. (2.) That the capital of the company mentioned in the memorandum of association shall be increased by the creation of 80,000 new shares of £10 each, amounting in the aggregate to £800,000."

At meetings of the company held respectively in the months of August and September, 1874, a special resolution was duly passed and confirmed: "That the regulations comprised in the schedule hereto shall from and after the passing of this special resolution govern the company to the exclusion of the regulations contained in the articles of association thereof registered on the 20th day of August, 1872, all and singular of which are hereby repealed and annulled."

The arrangement of the numbers of the new articles was different from that of the original articles. One of the old articles, No. 2, related to the carrying out of preliminary contracts, and was omitted from the new articles.

Arts. 3, 4, 83, and 84 of the new articles were identical with arts. 4, 5, 92, and 93 of the original articles, except that in art. 3 there was an immaterial alteration by the insertion of the word "and" before "in the aggregate."

The new art. 85, corresponding to the old art. 94, was as follows:—

"Subject to the last preceding article, and subject to any arrangement which may from time to time have been entered into relative to the remuneration of any manager or other officer of the company by way of commission or percentage on the net profits of the company, or on any part thereof, the entire net

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profits of each year shall belong to the holders of the shares of the company, and be divided *pro ratâ* upon the whole paid-up share capital of the company, and the directors may, with the sanction of the company in general meeting, declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon."

Before the month of April, 1880, 100,000 out of the authorized 130,000 shares had been issued, and £2 10*s.* called and paid up on each. The remaining 30,000 had not been issued.

On the 19th of April, 1880, notice of a special meeting of the company to be held on the 27th of April, 1880, was sent to the members, accompanied by a circular relating to the financial position of the company, and stating that the directors had prepared the following scheme to be submitted to the proprietors:—

"First, to raise £300,000 (the uncreated balance of the company's capital powers) by the issue of 30,000 £10 5 per cent. preference shares to be allotted *pro ratâ* amongst the holders of ordinary shares, which it is apprehended will be readily taken up, as there is no doubt they will command a premium in the market.

"Secondly, to raise by borrowing upon bonds, debentures, or mortgage a sum not exceeding £200,000.

"Thirdly, to make a call of £1 per share on the ordinary shares which will produce £100,000."

An extraordinary meeting was held on the 27th of April, 1880, at which the following resolution was passed:—

That the balance of the uncreated capital of the company, namely, £300,000, be now created, and that there be issued 30,000 new shares of £10 each, on the following terms and conditions, namely:

"1. The new shares to entitle the holders thereof to a dividend after the rate of 5 per cent. per annum upon the amount for the time being called up thereon, and taking precedence of and priority over all dividends and claims of the holders of the ordinary shares of the company.

"2. The calls upon the new shares to be payable as follows:—£2 per share on the 24th of June, 1880; £2 per share on the

24th of December, 1880; £2 per share on the 24th of June, 1881; £2 per share on the 24th of December, 1881; £2 per share on the 24th of June, 1882.

"3. Interest at the rate of £5 per cent. per annum to commence from the date when each call becomes due.

"4. Any moneys paid and received with the consent of the directors in advance of calls to bear interest at £4 per cent. per annum.

"That in the first instance the new shares shall be allotted to the holders of ordinary shares registered in the books of the company at this date as near as may be in the proportion of three new shares for every ten ordinary shares.

"That any new shares not accepted by the members to whom they are allotted remain at the disposal of the directors to be issued at such times, on such terms, and in such manner as they may think fit for the benefit of the company."

The whole 30,000 preference shares were issued, and the whole £10 was paid upon each. An additional £1 per share was called up and paid on each of the 100,000 shares previously issued. 5 per cent. dividend was regularly paid on the preference shares, and an average dividend of 8 per cent. on the amount paid up was paid in respect of the other shares down to the winding-up of the company.

The *Manchester Ship Canal Company Act*, 1885 (48 & 49 Vict. c. clxxxviii.), s. 22, provided that the *Manchester Ship Canal Company* should purchase within two years from the passing of the Act the undertakings of the *Bridgewater Navigation Company* for the sum of £1,710,000; provisions were made in that section and ss. 23 to 27 of the Act as to the details of the purchase and the payment of the purchase-money as between the two companies. No provision was made by the Act as to the application of the purchase-money among the shareholders of the *Bridgewater Navigation Company*.

A resolution was passed at a meeting of the *Bridgewater Navigation Company* held on the 10th of August, 1887, duly confirmed on the 16th of August, that the company should be wound up voluntarily, and the directors were appointed liquidators.

The purchase of the undertaking of the *Bridgewater Navigation*

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Company by the *Manchester Ship Canal Company* was completed, and the purchase-money of £1,710,000 was paid to the liquidators.

After having provided for the satisfaction of the liabilities of the *Bridgewater Navigation Company* and the return of all share capital paid up there remained in the hands of the liquidators a large surplus.

The liquidators took out a summons, which was now heard, to have it determined upon what principles and in what shares and proportions as between the holders of the ordinary shares in the company and the holders of the preference shares of the company issued on the terms of the resolution of the 27th of April, 1880, the balance of the proceeds of realization of the company's assets remaining in the hands of the liquidators after satisfying all the liabilities of the company and the costs of the liquidation thereof, and available for distribution among the shareholders thereof ought to be distributed.

A meeting of the ordinary shareholders had been held, at which *Thomas H. T. Birch* had been nominated as a proper person to represent the ordinary shareholders on this application. A similar meeting had been held of holders of preference shares, at which *George Hall Schofield* had been nominated as a proper person to represent the preference shareholders on this application.

On the 25th of November, 1887, a motion was made on behalf of the liquidators that *Thomas H. T. Birch* and *George Hall Schofield* should severally be appointed representatives of the two classes of shareholders. Mr. Justice *North* considered he had power to do so under rule 61 of the Order of the 11th of November, 1862, under the *Companies Act*, 1862, and appointed *Thomas H. T. Birch* to represent ordinary shareholders, and *George Hall Schofield* to represent preference shareholders, for the purpose of this application.

It was stated that the assets taken over by the *Manchester Ship Canal Company* in consideration of the purchase-money of £1,710,000 included the reserve fund formed under art. 93 and the substituted art. 84, and the parties did not wish on this occasion to get the decision of the Court as to how the part of the funds in the hands of the liquidators which represented such reserve ought to be dealt with.

The motion was heard before Mr. Justice *North* on the 16th of December, 1887.

Napier Higgins, Q.C., and *Phipson Beale*, for the liquidators.

Cozens-Hardy, Q.C., and *Clare*, for the representative of the ordinary shareholders:—

The sum now in question is net profit within the meaning of art. 94 of the original articles and art. 85 of the substituted articles: *Robinson* v. *Ashton* (1); *Binney* v. *Mutrie* (2); therefore divisible among the ordinary shareholders after payment of the £5 per cent. to which the preference shareholders are entitled till repayment. Upon this part of the case *Sheppard* v. *Scinde, Punjaub and Delhi Railway Company* (3) may be relied on by the preference shareholders; that, however, was a case depending on the special facts, and the company was regulated by the *Companies Clauses Act;* it can have no application to this case.

Our second contention is that the issue of the preference shares was *ultrà vires* at the time they were issued. The capital authorized by the existing memorandum was 130,000 £10 shares of which 30,000 were unissued, it was these 30,000 shares that were purported to be issued as preference shares. There was no power to issue such shares with a preferential dividend, though the company might by special resolution have altered the memorandum by creating other share capital capable of being issued as shares with a preferential dividend. It follows that all the holders of preferential shares are entitled to is a return of the money given for the shares with trade interest: *In re Guardian Permanent Benefit Building Society* (4).

Buckley, Q.C., and *Swinfen Eady*, for the representative of preference shareholders:—

The rights of the shareholders are equal, except so far as by a contract made on their issue (within the scope of the memorandum and articles) may have otherwise been determined; the only contract putting the shareholders on an inequality is that

(1) Law Rep. 20 Eq. 25.
(2) 12 App. Cas. 160.
(3) 36 W. R. 1.
(4) 23 Ch. D. 440, 460.

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the preference shareholders are out of the sums payable annually as dividends to receive the amount of £5 per cent. at least in preference to any dividend the other shareholders were to get. The surplus divisible now is not in the nature of a annual profit but is an accretion of capital. The shareholders are entitled to have capital returned or divided in proportion to the amount of capital paid up and invested in the undertaking: *Sheppard* v. *Scinde, Punjaub and Delhi Railway Company* (1); *Lindley* on Partnership (2); *Somes* v. *Currie* (3); *Griffith* v. *Paget* (4).

As to the issue of preference shares being invalid, if it was the law that the company had no power to issue the shares as preference shares, the shares were properly created; they will be taken to have been validly issued as ordinary shares, and the holders will in that case be entitled to have the money divisible divided in proportion to the paid-up capital.

Upjohn, for individual preference shareholders.

Cozens-Hardy, in reply.

1888. Jan. 16. NORTH, J. (after stating the facts, continued):—

The contending parties are the holders of 30,000 preference shares, and the holders of the other shares on which £3 10*s.* only has been paid, which I call for convenience ordinary shares. The former claim to have the whole surplus divided among the holders of all the shares in proportion to the amount paid up by each shareholder, the result of which would be that the sums which a preference shareholder and an ordinary shareholder would receive in respect of each share would be in the proportion that £10 bears to £3 10*s.* The ordinary shareholders contend that the utmost the preference shareholders can receive from the company is the capital they advanced with interest thereon at 5 per cent. till payment, and that the whole surplus assets belong to the ordinary shareholders exclusively and must be divided equally among them.

The claim of the ordinary shareholders is rested on two propositions, first, that the preference shareholders are not really share-

(1) 36 W. R. 1.
(2) 4th Ed. p. 679.
(3) 1 K. & J. 605.
(4) 6 Ch. D. 511.

holders at all, as the issue of shares to them was *ultrà vires*, and therefore when they have received back the money they have advanced with interest they will have got the utmost they are entitled to; and secondly, that even if they are shareholders their share of the profits is limited by contract in the articles to 5 per cent., and that by like contract the ordinary shareholders are entitled to all the other profits of the company, including all profits arising from the increase in value of its property.

With reference to the first point, my opinion is that the preference shares were validly issued, and that the holders thereof are shareholders. Under the original memorandum and articles the 500 ordinary shares and the 50,000 shares into which they were divided could not be issued with preferential rights. But the 80,000 new shares were in a different position, and could, under art. 4 of the original regulations, be issued with priority either as to dividend or in the distribution of assets if so resolved by a general meeting prior to their issue. Of these 50,000 were issued as ordinary shares. The remaining 30,000 were issued subject to and in pursuance of a resolution giving them a certain preference, and the result of this, according to the authorities, is that the shares have exactly the same *status* or qualification as if the memorandum of association had in terms authorized their issue with such preference. The implication of law between partners is, that they share equally in profits unless their contract provides to the contrary, and the right of shareholders to an equality in dividend in the absence of any provision to the contrary, rests on the same principle rather than upon any implication as to the construction of the memorandum: see *Guinness* v. *Land Corporation of Ireland* (1), and *In re South Durham Brewery Company* (2). The only question open to discussion is, whether the condition of these 30,000 shares—their potentiality of issue as preference shares—was affected by what occurred in 1874, when, in order to change the regulations of the company in some respects, new articles were substituted for the old, in which the old article numbered 4 was replaced by another article No. 3, in exactly the same words as the former article, except by the addition of the word "and," in a sentence not presently material;

(1) 22 Ch. D. 349. (2) 31 Ch. D. 261.

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although it is true that the phrase, "the amount mentioned in the memorandum of association," means different things in the two tables. In the original articles it means £500,000 divided into 500 shares of £1000 each. In the new article it means £1,300,000 divided into 130,000 shares of £10 each. It is quite possible that when the new articles were introduced in 1874 the exact position of these 30,000 created but unissued shares was not fully appreciated, but I do not believe that the company intended by the substitution of new for old articles to alter the *status* or quality of unissued shares, or to deprive itself of the power of issuing them at a preference, any more than I believe that the company by omitting its old article 2, which adopted the preliminary agreement and directed the company to carry it into effect, and not substituting any other in its place, intended to repudiate that agreement: and I hold that the constitution of the company from its inception having permitted the issue of new shares with a preference if so resolved, no alteration could be made in this respect by the substitution of new articles for the old. Indeed, unless the constitutional right of issuing new shares with a preference subsisted from the first the third new article was itself *ultrà vires* so far as it authorizes giving such a preference, for it was impossible for the company by any special resolution passed in 1874 to confer on itself any new power of issuing preference shares unless the creation of such power was authorized by its constitution: see *Hutton* v. *Scarborough Cliff Hotel Company* (1); *Ashbury* v. *Watson* (2); and the cases of *Guinness* v. *Land Corporation of Ireland* (3) and *In re South Durham Brewery Company* (4), to which I have before referred. If it is said that the powers in the new articles as to issuing new shares with a preference, coupled with the repeal of the old articles, amounted as a matter of construction to an implied abdication of like powers as to shares already created though unissued, the answer is, first, that such is not the true construction of the article; and secondly, that, if it is, still it is not within the powers of the company by any special resolution to alter the *status* of shares of the company as settled by its constitution.

(1) 2 Dr. & Sm. 521.
(2) 30 Ch. D. 376.
(3) 22 Ch. D. 349.
(4) 31 Ch. D. 261.

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The matter does not rest there, for in 1880 the 30,000 preference shares were proposed to be, and no doubt were, in fact issued to existing ordinary shareholders. They have accepted them and dealt with them, and no suggestion was made by the company as a continuing company that the preference shareholders were not full members with all rights as such. I do not say that this amounts to a ratification of what was done: (see *Ashbury* v. *Watson* (1), before referred to;) but even if the attempt to give to such shares a right to preferential dividend was *ultrà vires*, I see no reason why the issue of the shares themselves should not be a good issue and make the holders thereof shareholders in the company, so long as the agreement to take shares is treated as existing and the names of the holders are allowed to appear on the register of the company. Even if the circumstances were such that the person who had agreed to take preference shares was entitled to be relieved from his contract no one has sought to be so relieved, and down to the present time no application has been made by any one to remove the preference shareholders from the register, nor have I been asked to give an opportunity for such an application to be made; and I am therefore unable to accede to the argument that the preferential shareholders are not shareholders at all.

The next point is, what interest the preference shareholders take in the surplus assets; and that must depend on the contract between the members of the company contained in the articles, if and so far as they bear on the subject. According to the articles preference might have been given both as to dividend and in the distribution of assets. But the preference actually given is as to dividend only. It is defined by the first resolution of the 27th of April, 1880, which I need not again read. It was contended for the preference shareholders that the fund available to pay dividend must be first applied to pay them 5 per cent., and then to pay the ordinary shareholders up to that amount, and then that the balance must be divided *pro ratâ* upon the whole paid-up share capital of the company in proportion to the amounts paid up. I do not take that view. I hold that art. 85 must be read as subject to any other provision which may

(1) 30 Ch. D. 376.

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be made under the articles as to a preferential dividend so far as any such provision may extend, and that the provision for dividends to the holders of preference shares is to be found in the resolution I have just referred to. The resolution does not give them in terms a preferential dividend of 5 per cent., which might be consistent with their having further dividends also in common with ordinary shareholders, but it gives them a defined dividend of 5 per cent., and then goes on to say, "And this dividend is to take precedence," and so on, and I understand this to mean that they are to have a dividend of 5 per cent., neither more nor less, which is the view the company and the shareholders have always taken. If what Mr. *Buckley* had contended for had been meant nothing would have been easier than to express it.

What, then, is the agreement contained in the articles as to the funds available for payment of dividend? Art. 83 limits this fund to profits of the company arising from the business of the company as shewn upon the balance-sheet which shall from time to time have been examined and approved of by the auditors, referring to the annual audit provided for in articles numbered from 93 to 102; though this is subject to the qualification in art. 86 that the directors may once a year make a payment on account of dividend on their own authority, that is, without such a balance-sheet. Art. 84 then provides for the setting aside and investment of part of the profits as a reserved fund and otherwise, and then in art. 85 it is provided, that subject to such setting aside, and also to payment of any arranged remuneration by way of commission or percentage, the entire net profits of each year shall belong to the shareholders. In my opinion this clearly refers to the profits realised by the carrying-on the business of the company in ordinary course while the company is a going concern, and nothing else; and the memorandum shews what the business of the company is. The balance-sheet referred to in art. 83 is that to be prepared annually from time to time, and the profits divisible are the net profits from year to year, and no other are divisible under the article. I do not say that nothing can be profit which does not appear on the balance-sheet. It may well be that some payments, for instance by the *Manchester Ship Canal Company* in respect of the outstanding advances,

charges, and book debts, will be divisible as profits, though received by the liquidators only, and never included in the auditors' balance-sheet. But this is only because they are items which would appear in the usual annual balance-sheets from time to time while the company was a going concern. I find it impossible to hold that any of the profits arising from the compulsory sale of the entire undertaking of the company is profit from the business of the company to be included in successive balance-sheets; or that the sum which represented the gradually increasing value of the undertaking in the course of many years can be net profits of the year in which the sale takes place; or can be profits in which a manager or other officer of the company who might under art. 84 be entitled to remuneration by way of commission or percentage on the net profits of the company would be entitled to share.

Mr. *Cozens-Hardy* relied in support of his argument on the cases of *Robinson* v. *Ashton* (1) and *Binney* v. *Mutrie* (2). In the first case the Master of the Rolls made a general remark, that in the absence of special agreement the rise or fall in the value of fixed plant or real estate belonging to a partnership was as much profit or loss of the partnership as anything else. But the only question in that case for decision was, whether a certain mill, which was sold for more than it stood at in the books, belonged to the partnership or to one of the partners, and I do not see that the right of one partner to half the profits of the mill, if the mill belonged to the partnership, was in dispute. In the second case there were three partners who had contributed capital in unequal parts and were entitled to the business (which was held to mean profit and loss) in shares which were unequal *inter se*, and did not correspond with their respective shares in the capital. It was held that the surplus realised by carrying on the business was to be divided in accordance with the direction in the articles as to the business, that is, as profit and not capital. I do not see how either of those decisions throws any light on the present case.

I do not think it necessary to consider whether the large increment which has taken place in the assets of the company

(1) Law Rep. 20 Eq. 25. (2) 12 App. Cas. 160.

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can be properly called profits of the company or not. It is due in part to a rise in value of the property; in part to the appropriation, under art. 84, of moneys which the directors might have divided as profit, if they had not thought fit to apply them otherwise; and in other part to the enhancement in price by a statutory sale of the undertaking of a prosperous company. "Profits" is a word of ambiguous meaning. In its largest sense such increment might no doubt be called "profits," but what I hold is, that this increment is not profits divisible under the article to which I have referred, and there clearly are no other articles in any way referring to it.

I find, therefore, that the parties have not entered into any contract as to the mode of division of this surplus, but that it is to be divided on equitable principles. There is little direct authority to assist me in the matter. The general observations of Sir *George Jessel* in *Griffith* v. *Paget* (1), refer to a partnership in which the assets were insufficient to return the capital in full, and the particular decision turned on the construction of articles very different from the present. I do not know on what calculation the price has been arrived at, nor do I think that material. The contention that the holder of preference shares is merely entitled to have his capital back with 5 per cent. interest on it, and that the whole surplus is to go to the holders of the ordinary shares, does not appear a very reasonable one in the absence of contract to that effect, and for this reason. The consideration paid is for the acquisition of all the property of the navigation companies, and the extinction of all the shares therein: and this could only be on the principle of compensating the shareholders for what is taken from them. Now it is obvious that the holder of ten preference shares, or £100, carrying 5 per cent. preferential dividend, in a large going concern, the profits of which suffice to pay the holders of ordinary shares an average dividend of 8 per cent., has what is worth far more than the £100 he paid up for it. It would probably be worth half as much again. If the *Manchester Ship Canal Company* had purchased the undertaking upon the footing of continuing in some way the rights of the preference shareholders, there cannot be

(1) 6 Ch. D. 511.

a doubt that the purchase-money would have been reduced by much more than the £300,000, the amount paid up on the preference shares. If, therefore, the holder of ten preference shares received £100 only, he would not receive adequate compensation for what had been taken from him. On the other hand, the contention of the preference shareholders that the proper mode of distributing this increment is among all the shareholders in proportion to the amount paid up on the shares, has this in its favour, that it is in exact accordance with the express provisions of the articles, as to the manner in which profits divisible thereunder are to be distributed in the possible event of shares being held with unequal amounts paid up thereon, and with the provisions of the resolution of April, 1880, so far as relates to preference shares.

But the question I have to decide is not what is a reasonable mode, but what is the equitable mode of distributing the increment in question. In my opinion the recent case before the Court of Appeal of *Sheppard* v. *Scinde, Punjaub, and Delhi Railway Company* (1) is so like the present as not only to assist me but to furnish an authority I ought to follow. In that case the Secretary of State for *India* had purchased the undertaking of the company under a paramount power at a price which, after refunding all the capital, left a surplus to be divided among stockholders (who were in the same position as fully paid-up shareholders) and holders of twenty shares on which £5 only had been paid up. Under sect. 120 of the *Companies Clauses Act*, dividends were payable only on the paid-up capital and not subscribed capital. In these points the case resembled the present, and also in that the Acts which regulated the rights of the stock and shareholders contained no express provision how the surplus was to be divided. There were no persons entitled to any preferential dividend of fixed amount, but that is not material, having regard to the construction I place on the articles. It was there held that the surplus was divisible in proportion to the amounts paid up on the shares. Lord Justice *Cotton* says: "In dealing with the case before us, it may be well to know what would be the rule in the case of an ordinary partnership. In my

(1) 36 W. R. 1.

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opinion the rule is not that which is contended for on behalf of the plaintiff. I think the general rule is that, after providing for the capital at the credit of each partner, the surplus assets should be distributed in the proportions in which the capital has been contributed by the partners. That view is supported by *Binney* v. *Mutrie* (1), and is in accordance with the proposition laid down in *Lindley* on Partnership" (2). I must admit that this is not my view of the decision in *Binney* v. *Mutrie*, as it was there held, as I read it, that the surplus was divisible as profit under the express provision of the second of the partnership articles; but the opinion of Lord Justice *Cotton* will stand without such support, and the real decision in *Binney* v. *Mutrie* in no way conflicts with it. Lord Justice *Bowen* took the same view, and held that the equitable mode of distribution was in proportion to the contribution, and so did Lord Justice *Fry*. He got at it in rather a different way; he held that according to the constitution of the company all profits were distributable, all good things were to go, in proportion to the money paid up, and that the surplus in that case was something paid in expectation of future profits, and therefore ought equitably to be divided, not as profit under sect. 120, but by analogy to the way in which the profits, if they had been earned, would have been divisible. That is how I understand his remarks as reported.

If the view I have taken that the surplus now distributable is not profit divisible under the article is correct, the principle of the decision in that case applies to the present, and settles the mode in which the increment with which I have to deal, whether it be called profits or accretion to capital, ought now to be divided: and I must make a declaration that the balance of the proceeds of sale of the undertakings of the *Navigation Company* to the *Manchester Ship Canal*, remaining after satisfaction of all the debts and liabilities of this company, and the costs of its liquidation, and repayment to the shareholders of all the capital paid up, ought now to be divided among the holders of all the shares of the company in proportion to the amount paid up upon their shares. It will be observed I have departed slightly from the notice of motion, because I have been told that certain other

(1) 12 App. Cas. 160. (2) 4th Ed. p. 679.

questions have arisen among the shareholders, as, for instance, the mode of dealing with the reserve fund, and I desire not to prejudice any other question by my present decision.

D. P.

From this judgment, Mr. *Birch* appealed. The appeal was heard on the 10th of April, 1888.

Sir *Horace Davey*, Q.C., *Cozens-Hardy*, Q.C., and *Clare*, for the Appellant:—

The distribution of the surplus assets is governed by sect. 133 of the *Companies Act*, 1862, which relates to the voluntary winding-up of companies. By sub-sect. 1 the liquidator is to distribute them, after payment of liabilities, among the members "according to their rights and interests in the company." What are the rights and interests of the preference shareholders in the company? They must be determined by the resolution creating the shares, and so far as that does not define them by the ordinary law of partnership. We say they have no right or interest in the company beyond the 5 per cent. annual dividend on their shares; all profits beyond that dividend are divisible among the ordinary shareholders. The preference shareholders may perhaps be entitled to a perpetual annuity of 5 per cent. on their shares, or to a capital sum representing it, but nothing more. This surplus is in the nature of profits acquired by the company. Whether it is strictly profits or not is immaterial, it must be divided on the same principle as profits: *Robinson* v. *Ashton* (1); *Binney* v. *Mutrie* (2); *Watney* v. *Wells* (3). The principle on which *Sheppard* v. *Scinde, Punjaub and Delhi Railway Company* (4) was decided was consistent with our contention, although the result was different. There was no question in that case between preference and ordinary shareholders, and, moreover, the question did not arise under the *Companies Act*, 1862, but under the special Act of the company.

If the Respondents are right in their contention that the preference shareholders are entitled to share in the surplus assets,

(1) Law Rep. 20 Eq. 25.
(2) 12 App. Cas. 160.
(3) Law Rep. 2 Ch. 250.
(4) 36 W. R. 1.

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the right principle of division will not be in proportion to the amount paid up, but the payments of the shareholders must be equalized by calling up that portion of the ordinary shares which had been unpaid, or repaying what had been paid by the preference shareholders in excess of the others, and then dividing the surplus assets among the shareholders in proportion to the number of their shares. It is a mere accident that some of the shares are paid up and some not. This is the principle that is applied in repaying the capital out of surplus assets, and it must be applicable also to division of profits beyond the capital: *Ex parte Maude* (1); *Oakbank Oil Company* v. *Crum* (2).

Rigby, Q.C., *Buckley*, Q.C., and *Swinfen Eady*, for the preference shareholders:—

The preference shareholders are parties in the undertaking and have equal rights in the capital and profits, except so far as their rights are limited by the terms on which the shares were created. That limitation only extends to the receipt of the annual profits while the company is a going concern. In *Binney* v. *Mutrie* (3) there was a special provision in the articles which really made the case unarguable. In *Somes* v. *Currie* (4), the articles not providing for the case, the fund was divided according to the amounts paid-up. The true contest here is not between preference and ordinary shares, but between partly paid-up and fully paid-up shares. There are two purposes of a call, to find more money to be employed in the business and to pay debts. There is no other purpose for which a call can be made, unless it is wanted for equalizing liabilities between contributories in a winding-up: *Companies Act*, 1862, s. 133 sub-s. 9. The rights of the parties must be ascertained independently of this section, which is only ancillary for the purpose of working out the rights. The liability to contribute is only to contribute in certain events for supplying capital or paying debts. The case is similar to *Sheppard* v. *Scinde, Punjaub and Delhi Railway Company* (5), and we say that Mr. Justice *North* was right in dividing the fund in

(1) Law Rep. 6 Ch. 51.
(2) 8 App. Cas. 65.
(3) 12 App. Cas. 160.
(4) 1 K. & J. 605.
(5) 36 W. R. 1.

proportion to the amounts contributed. *Ex parte Maude* (1) shews how the assets are to be dealt with so as to throw the losses equally among the shareholders. Sir *H. Davey* contends, first, that everything beyond the £5 per cent. interest and the capital of the preference shares goes to the ordinary shareholders. There may be cases in which that rule would be the proper one, but it is not generally so. Suppose an old brewery, the senior partner in which had £100,000 in it, and it is stipulated that he shall receive £15,000 a year out of the profits, and the other partners the rest of them. If a railway company comes and takes the brewery at a very high price, is the senior partner only to have his £100,000, leaving the surplus for the other partners? There is no rule that because there is a certain division of profits while the business is going on there shall be a dividend on that footing when the business comes to an end. *Binney* v. *Mutrie* (2) went on the terms of the articles, and in *Robinson* v. *Ashton* (3) the business came to a natural end, and it was held that the increased value of a mill which was decided to be partnership property was profit and divisible as such, but no case extends the rule arising from division of profits to a case quite outside of the ordinary course of business. There is a difference between the case of an ordinary partner and a shareholder, the ordinary partner is entitled to pay up, the shareholder cannot pay up unless the company chooses to make a call. Here from the time of the sale of the undertaking it was known that no call would ever be made.

Napier Higgins, Q.C., and *Sampson*, for the Liquidators.

Sir *H. Davey*, in reply:—

The question of principle in this case is—what is the proper mode of distributing surplus capital after all the capital actually advanced has been repaid? There must be a general rule applicable to such cases, and it must be either to return the surplus according to the shares in which the shareholders were entitled to the profits while it was a going concern, or return it in proportion to the shares of the members in the capital. To make it

(1) Law Rep. 6 Ch. 51. (2) 12 App. Cas. 160.
(3) Law Rep. 20 Eq. 25.

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divisible according to what has been actually paid makes the dividend depend on an accident. *Lindley* on Partnership (1) discusses the question. There is no authority which settles the abstract principle. The other side attempt to minimize the effect of *Robinson* v. *Ashton* (2), but it is an authority in our favour, it was not there attempted to argue that the dividend must be according to the contributions. *Watney* v. *Wells* (3) goes far to decide the present case. There is no authority in ordinary cases of partnership for distributing surplus capital according to the contributions, and it is laid down in *Griffith* v. *Paget* (4) that, in the absence of express provisions, questions as to companies are to be decided according to the rules of ordinary partnership. *Somes* v. *Currie* (5) went on the special terms of the charter and Acts. If there is any principle at all in *Sheppard* v. *Scinde, Punjaub and Delhi Railway Company* (6) it is in my favour. The preference shareholders having bargained for a fixed dividend cannot have the same interest in the assets as ordinary shareholders who take their chance and get the benefit of the profits and income. The interest of preference shareholders entitled to £5 per cent. dividends cannot be put higher than the value of a perpetual amount at £5 per cent. The argument that a call could not be made is singular—however solvent a company may be, it may find it expedient to make a call and has power to make it.

1888. May 15. Cotton, L.J.:—

This is an appeal from a decision of Mr. Justice *North*. There are some unusual circumstances to be dealt with, because the appeal relates to the division of a large sum of money paid by the *Manchester Ship Canal Company* to the company now being voluntarily wound up, sufficient to return all the paid-up capital and to leave a large surplus. The question is, how that surplus is to be divided.

The *Bridgewater Navigation Company* was formed under the *Companies Act*, 1862. The shares were £10 shares, but they were divided in this way. The ordinary shares were shares of £10,

(1) 5th Ed., p. 402.
(2) Law Rep. 20 Eq. 25.
(3) Ibid. 2 Ch. 250.
(4) 6 Ch. D. 511.
(5) 1 K. & J. 605.
(6) 36 W. R. 1.

but £3 10*s.* only was paid upon those shares and no more had ever been called up. But besides those ordinary shares there were preference shares of £10 each on which the whole amount of the £10 had been paid, and the question is how, as between those two, is the surplus I have mentioned to be distributed.

Mr. Justice *North* decided that it was to be divided between the preference shareholders and the ordinary shareholders in accordance with the sums which they have respectively paid up; and this appeal is by Mr. *Birch* representing the ordinary shareholders.

The company is now being voluntarily wound up under the Act of 1862, and I will refer at once to the provisions of that Act with regard to voluntary winding-up for the purpose of disposing of the question which seemed to arise on sect. 133, which deals with the distribution of surplus assets in a voluntary winding-up; sub-sect. 10 of that section says, "The liquidators shall pay the debts of the company, and adjust the rights of the contributories amongst themselves." Then by sub-sect. 1 it is enacted that "The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company"; and it seemed at first sight, as if the true construction might be this, that the surplus assets after providing for all the debts and liabilities should be divided per share so that each share should have its aliquot proportion, not with reference to the amount paid up on the share, but, each share in the company taking an equal sum. That I think can hardly be the meaning of that section, because when we look at the provision as to compulsory winding-up, which is sect. 109, we find that the words of that section are these: "The Court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto"; it can hardly be that those two clauses are contradictory one to the other. We must read them together, because it is hardly possible to suppose that when there is a winding-up by the Court the surplus assets, if any, are to be divided in a different way from that in which they would be divided if

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the winding-up was voluntary. I think we must read them both together, not attributing to the words in sect. 133 a direction to divide the property rateably according to the shares, but understanding that the Act does not define in any way how the division is to be made, but leaves it in the one case to the Court and in the other case to the voluntary liquidators to divide the surplus assets in accordance with the rights of the parties who are interested in the company as shareholders.

Therefore, we must consider, independently of that provision, what ought to be done in the present case. The first contention urged by Sir *Horace Davey* was this, that the preference shareholders were entitled to nothing more than the amounts they have paid up—all the profits beyond 5 per cent. are profits which went to the ordinary shareholders, as, in fact, was the case as regards profits arising year by year by the working of the company; or, he said, if that were not so all the preference shareholders were entitled to receive was the value (one does not quite know for what period) of 5 per cent. on their shares and that everything else went to the ordinary shareholders.

Now, we must look a little at the articles and the regulations under which these preference shares were formed. The original articles were altered in the year 1872, but there is one provision which is to be found equally in both, which is this plan to increase the capital. In the original articles it is clause 4: "The company may, by the resolution of a general meeting, increase its capital beyond the amount mentioned in the memorandum of association by the creation of new shares of such amounts per share in the aggregate as such resolution shall direct, and any new capital so created may carry such preferential right to dividend or such priority in the distribution of assets, as any resolution of a general meeting, passed previously to the issue of any such new capital, shall direct." There is no provision at all for such a case as has happened—no provision at all giving the preference shareholders any preference or priority in the distribution of assets which there might be in the ultimate winding-up of the company. Then I come to what I think is the important clause both in this and the altered articles: "But, save as specified, in any such resolution all new capital

shall be subject to the same provisions in all respects as if it had been part of the original capital mentioned in the memorandum of association." In the year 1872, there was a resolution to increase the capital of the company, and then after that there was an alteration made in the articles; and that which I have read in the original articles became clause 3 in the revised articles. I need not read it again, because it is really to the same effect. Then we come to the directions as to the appropriation and distribution of profits. They are contained in clauses 83, 84, and 85, which are the same as clauses 92, 93, and 94 of the old articles. [His Lordship read the clauses.] Those I think are all that are material. Then we come to the resolution which, in fact, directed the issue of the shares in question. It was passed on the 27th of April, 1880, and it was in these words:—[His Lordship read the resolution.] There is nothing said in reference to any priority in the winding-up or in the distribution of the assets of the company. Then there is a provision how the money is to be expended and that I need not read.

In my opinion, having regard to the resolution and the articles of the company, it is wrong to contend that these preference shareholders can get nothing more. It is true that this is to be considered as profit in one sense, not profit arising from the working of the business, not profit in respect of which dividends may be declared, but it is profit, that is to say, it is an increase of the value of the property of the company beyond that which is contributed for the purpose of creating profit. But, in my opinion, the fact that the preference shareholders, the holders of the 30,000 shares, were to have 5 per cent. preference dividends, and that the rest arising from the profits of the working went to the other shareholders of the company, does not in any way apply to such profit as this. It applies to the profit arising from the working of the business of the company, but it does not apply to this, which is an augmented value of the company which has now been obtained by a beneficial sale, and in my opinion it would be putting them, contrary to the terms of the articles, in a different position from the other shareholders to say they were to be entitled not to such a proportion as may

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be right of their augmented capital, but only to the value of 5 per cent. as if the company were going on. The 5 per cent. does not apply to what is to take place after the business stops. Not only so, but I think it would be a violation of the articles to say that they are not to have what may be their fair proportion of the sum.

Then it was contended that the right course in the distribution of the assets would be to provide for payment of the £6 10*s.* which is still left to be called up on the ordinary shares and then make the division equally between the shareholders; and it was said that this case differed from that of *Sheppard* v. *Scinde, Punjaub and Delhi Railway Company* (1) in this Court, because, as was there pointed out, that was not a case under the Act of 1862, but was dealt with under the Acts of the company, the powers given to the Secretary of State for *India*, and the contract entered into with him. This is undoubtedly a winding-up under the Act of 1862. But what is the consequence? It is very true that where there is a deficiency of assets and some calls have not been paid, the ordinary course is to act as if calls were made on those who have not paid up the full amount of their calls, and if that is not actually done, to treat it as done, and then to divide the remainder on the footing I have mentioned. But in this case there was no default at all by the ordinary shareholders. They have never been called upon to pay the £6 10*s.* which was still due. It is true that they held their shares with a liability to pay the £6 10*s.*, but there was no call made on them nor any default on their part. These holders of the preference shares got this benefit, that they would have been paid their full amount of 5 per cent., in preference to the ordinary shareholders, and then those who had only paid £3 10*s.* would get everything that remained. As the company was apparently a very profitable one the ordinary shareholders got a very great benefit by not being called upon to pay up more than £3 10*s.* But, in my opinion, the cases under the *Winding-up Act*, where the power of making calls might be material, only apply where there is some deficiency, that is to say, although there may be enough to pay all the debts of the company due to those who are not members, yet not enough

(1) 36 W. R. 1.

without making the call to provide for the rights *inter se* of the shareholders, and I do not think those cases will throw any light on a case like this or enable us to decide what is the proper equitable distribution of this fund.

That being so, how ought the division to be made? In my opinion it ought to be distributed as Mr. Justice *North* has distributed it. We are not left without some guide as regards the matter. The provision with regard to dividend only applied to what is to be done in the division of the profits arising year by year in the working of the business of the company. This sum now to be divided, though called profit, is profit arising in a different way, and is not to be regulated entirely by those articles. But I think the articles do shew that both as regards the preferential shareholders *inter se* and the ordinary shareholders the right to that dividend was to be on the footing of its being in proportion to the sum paid up on the shares. That is the footing on which to decide it. All question of preference is now at an end, and the shareholders are to be dealt with as having equal rights, because the provision in the articles creating the preference shares as regards dividend to arise on the working of the capital is at end. We must deal with them all as shareholders having equal rights, and in my opinion when that is so, and when there is the indication in the articles of association, which form the contract of partnership, that profit is to be divided when it is a going concern and arising from the working of the business in accordance with the sums paid upon each share, then in this particular case, and having regard to that provision, the true equitable mode of dividing this sum is to divide it among all the shareholders in accordance with and in proportion to the amount paid up by them on their shares. That is the way in which Mr. Justice *North* has decided this case, and I think he was right.

The case of *Sheppard* v. *Scinde, Punjaub and Delhi Railway Company* (1) is not exactly similar, but I think the principle applied there was the same, and I need not enter into the questions argued as to what would be the ordinary division of assets in a private partnership, because it is almost impossible to lay

(1) 36 W. R. 1.

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down any definite rule with reference to the contracts which may exist between the parties and the provisions from time to time made in those contracts as to how the ultimate balance is to be provided for. We almost always find in partnership articles, if they are carefully drawn, that there are provisions how the assets are to be divided after the debts are paid, and I think it would be unwise to lay down as a general rule what is the proper application of the surplus assets without looking to what is the contract in each individual case. I do not refer, therefore, to those passages, which were much relied on, in Lord Justice *Lindley's* book and in the case before the Privy Council, which turned on the actual provisions in the articles of partnership, because, in my opinion, having regard here to the contract between the parties, the proper decision is that to which Mr. Justice *North* has come.

FRY, L.J.:—

This case is one of a very unusual and, perhaps, unique description, for we have to deal not with a deficiency of assets, but with an *embarras des richesses*. The winding-up is a voluntary one, and, accordingly, we are bound to distribute the surplus assets which remain after satisfying all the liabilities of the company and after the amount of capital paid up by the shareholders has been returned, amongst the members according to their rights and interests in the company. Those are the words of sect. 133, which govern a voluntary winding-up. There is, as has been pointed out by the Lord Justice, an apparent difference from the words used in the case of a compulsory winding-up, because sect. 109 directs the Court to distribute any surplus that may remain amongst the parties entitled thereto. It is, perhaps, not material to discuss the point, but, to my mind, there is no real discrepancy between the language used in the two sections, because the members of the company are the parties, to use the language of the statute, entitled to the surplus assets. The one section is silent as to the principle of the division; the other directs it to be according to the rights and interests of the members in the company.

That being the statutory direction it becomes incumbent on

us to inquire what are the rights and interests of the members of this company. The shareholders in the company are of two classes. There are preference shareholders, whose shares are fully paid up; there are ordinary shareholders, whose shares are only partially paid up. It follows there are two differences between the classes which require our consideration. The one difference is between the preferential right to dividend and the right to dividend after that has been satisfied, and the other difference is the difference in the amounts paid up on the shares respectively.

Now, first, does the difference between the rights of a preference shareholder and an ordinary shareholder make any difference for this purpose; does it affect their rights and interests? The new and the old articles of the company alike make similar provisions with regard to the creation of preferential capital: they provide that new capital may be created and that any new capital so created may carry such preferential right to dividend, or such priority in the distribution of assets, or be subject to such postponement of dividend or in the distribution of assets as any resolution of the general meeting passed previously to the issue of any such new capital shall direct. Observe, the article deals separately with the preferential right to dividend, by which I understand annual dividend, and a priority, which is the same thing as preferential right, in the distribution of assets. The two things are treated separately by the articles. Power is given to the company to give this preference with respect to dividend or with respect to the distribution of assets, or again, to postpone the right to dividend or to postpone the right in the distribution of assets; but unless that be done, all new capital shall be subject to the same provisions in all respects as if it had been part of the original capital mentioned in the memorandum of association. Therefore, except so far forth as any resolution gives priority in respect of dividend or priority in respect of distribution of assets, the preference and the ordinary shares are precisely on the same footing.

Now what has been done is this. A resolution has been passed which has given to the capital then created a right to a dividend at the rate of 5 per cent. on the amount for the time being called

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up thereon, taking precedence of and priority over all dividends on the ordinary shares of the company. Observe, that relates only to dividend, which I read to mean annual dividend. The power to create a preference in the distribution of assets is not exercised. It follows that, except so far as the preferential right to dividend goes, the preferential shareholders and the ordinary shareholders stand upon precisely the same level. They are regulated by the same provisions in all respects as if they held parts of the same capital. It follows, therefore, in my judgment that except only this right to preference in the annual dividends, no difference is created in the rights and interests of these two classes of shareholders by that preference.

But, then, in the second place, as I have already observed, there is a difference in the amounts paid up on those shares. We find, that in article 94 of the first set of articles of association and in article 85 of the subsequent articles of association, the direction is that the dividend is to be paid on the shares in proportion to the amounts paid up thereon. It follows that while the original liabilities of all the shareholders are equal, the payment up being unequal, the right to dividend is unequal. That is the constitution of the company with regard to the shareholders.

Then I go back to the question, and I inquire how ought we to distribute this surplus fund among these shareholders according to their rights and interests in the company? The shares are all of one nominal amount; the right to vote is, I believe, the same in all; I presume the right to serve as directors and fill other offices of the company is equal in all; but the right to dividend is different; the right to dividend is according to the amount paid up thereon. Which of these rights, namely, the right to vote or the right to receive dividends (for it seems to me to come to that) is the dominant and guiding right in respect of the distribution of these surplus profits among the shareholders of the company? I unhesitatingly say that the right to dividend is more like the right to surplus than any other of the ordinary rights or interests of the members in the company, and therefore is that which must determine among the members their rights in the distribution of the assets. I think, therefore, the decision below was quite right.

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LOPES, L.J.:—

As to the mode of division of surplus assets there is little, if any, direct authority to assist the Court, and I presume that is accounted for by the fact that in cases of winding-up it seldom happens that there are surplus assets. The case of *Sheppard* v. *Scinde, Punjaub, and Delhi Railway Company* (1) has been referred to, and although that is different from the present in many respects, the decision in that case appears to me to involve the same principle as that on which the Court is now acting. I entirely concur in the judgments that have been delivered, and I have nothing to add to them.

Solicitors for Liquidators: *Cunliffes & Davenport*, agents for *Lingards, Manchester.*

Solicitors for Representative of Ordinary Shareholders: *Cunliffes & Davenport*, agents for *T. E. Sampson, Liverpool.*

Solicitors for Representative of Preference Shareholders: *Burgess & Cosens*, agents for *Arthur Buckley, Manchester.*

Solicitors for individual Preference Shareholders: *Clarke, Woodcock & Ryland*, agents for *Chew & Sons, Manchester.*

M. W.

WATERMAN *v.* AYRES.
In re WATERMAN'S TRADE-MARK.

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1888
KAY, J.
April 20.
C. A.
May 16.

[1888 W. 960.]

Trade-mark—Registration—"Fancy Word"—Patents, Designs and Trade Marks Act, 1883, *s.* 64, *sub-s.* 1 (*c*).

W. registered the word "*Reversi*" as a trade-mark for "a game somewhat analogous to draughts." The word was the name of a game of cards popular in *France* in the 16th century. In the rules of *W.'s* game the word "reverse" frequently occurred, and the game depended on each player reversing or turning over his adversary's counters. *A.* brought out a similar game under the name "*Annex*," and on the labels of the boxes in which he sold it, he added to the name "a game of reverses." *W.* brought an action to restrain *A.* from infringing the trade-mark, and *A.* applied to remove the trade-mark from the register. *Kay*, J., refused the

(1) 36 W. R. 1.

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application to vary the register, and granted an injunction to restrain *A.* from using in his labels the word "reverses," or any colourable imitation of "*Reversi*":—

Held, on appeal, that as the word "*Reversi*" would suggest to an ordinary Englishman the idea that the game had something to do with reversing, it was not a word which obviously could not have any reference to the character of the article: *In re Van Duzer's Trade-mark* (1); that it therefore was not a "fancy word," and ought to be removed from the register:

Held, also, that the use of the words "a game of reverses," which were a fair description of the nature of the game, did not shew any design on the part of *A.* to pass off his game as that of *W.*, and that an injunction ought not to have been granted.

Per Fry, L.J.:—A name which has been given to a new article, and which is the only name by which it is known, cannot be a "fancy word" as regards that article.

IN February, 1887, the Plaintiff applied to register the word "*Reversi*" as a trade-mark for "a game somewhat analogous to draughts," and it was registered on the 18th of October following.

The Plaintiff deposed that he invented this game and completed the rules of it in 1882 and the early part of 1883, and in May, 1883, offered it for sale under the name of "*Reversi*." It appeared that there was a large and increasing sale of the game.

The Defendant was selling a game under the name of "*Annex*," and latterly added on the boxes in which it was sold the words, "The New Game, *Annex*," and then, in smaller letters, "a game of reverses." He deposed that this was only a cheap form of a game called "*Annexation*," which he had sold ever since 1876, and that the Plaintiff's game "*Reversi*" was also, with slight modifications, the same as "*Annexation*."

On the 27th of March, 1888, the Plaintiff commenced his action for an injunction to restrain the Defendant from infringing the trade-mark, and for damages, and shortly afterwards gave notice of motion for an injunction. The Defendant on the 13th of April gave notice of motion to remove the trade-mark from the register. The two motions now came on for hearing together, the latter motion being opened first.

The Defendant deposed that he used the words "a game of reverses" as the best way of indicating in a few words the nature

(1) 34 Ch. D. 623, 639.

of his game. The Plaintiff deposed that "*Reversi*" was an obsolete French word for a particular game of cards popular in *France* in the 16th century, and that the Plaintiff's application of it to his game was purely arbitrary. The printed rules of the Plaintiff's game contained the following passages: "Then *A.* can turn over or 'reverse' his opponent's counters till the row is red. *B.*, black, now plays in a similar manner. . . . Always remember that in order to turn a row or rows, as the case may be, of your opponent's counters, one of your own must stand at each end of the line or portion of line that you intend to 'reverse.' A player cannot 'reverse' a row of his opponent's counters if there be any gap in it. He must 'reverse' all the rows to which his move may entitle him. (If preferred the player need only 'reverse' one line of his opponent's counters, but this deviation from the rule must be agreed upon by both parties at the commencement of the game.) Should he be unable to 'reverse' any row he forfeits his turn in favour of his adversary." . . . " . . . it will be desirable to secure the corners of the board, as a counter so placed cannot be reversed."

The motions were heard before Mr. Justice *Kay*, on the 20th of April, 1888.

Aston, Q.C., and *Sebastian*, for the Defendant, contended that "*Reversi*" was not a "fancy word not in common use" within sect. 64 of the *Patents, Designs and Trade Marks Act*, 1883; also, that, as it was not used to indicate an article made by a particular manufacturer, and was merely descriptive, it was not capable of being a trade-mark within the Act.

Marten, Q.C., and *Birrell*, for the Plaintiff, were not called upon.

KAY, J.:—

The Plaintiff in this action represents that he invented a particular game, and he applied to that game a word which certainly is not an English word, and is not in common use in *England*. The word, he says, is an obsolete French word, describing an obsolete French game. I am furnished with a dictionary in which it appears that it was applied to a game of cards in *France*.

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The Plaintiff says that that was in the 16th century, but that the game and the word are now obsolete. It is not a word which is in form a French word. It is rather more like the reflective form of Italian verbs which one is familiar with. However, I should not have the least hesitation in saying that the word, when applied to an article in *England*, would come within the definition of a "fancy word not in common use" within the 64th section of the *Patents, Designs and Trade Marks Act*, 1883, and is a word which, if properly applied, may be registered.

The most formidable objection made to the registration of it is this. It is said: "True, you did invent this game to some extent; true, it is your invention; but it is a modification of a game called '*Annexation*'; you modified the game of *Annexation*, and you called the game by this fancy name—'*Reversi*': but you did that in 1883, and having called this new game of yours, or this new modification of yours, by that name, the name became the name of the game, and, therefore, as anybody was at liberty to make and sell the game, they were at liberty to sell it by the name you have put upon it; and, accordingly, in 1887, when you registered this name, you had no right to do so." That would be very cogent if it were shewn that there was such a market for this game that the word had become attached to the game and that other people had been making and selling the game by that name. There is no such evidence. There is no evidence whatever before me that down to 1887 anyone ever made or sold this game by the name of "*Reversi*" except the Plaintiff. Then, if the Plaintiff was the only vendor of the game by the name of "*Reversi*" down to that time, although other people were making and selling the game by another name, that is enough to convince me that "*Reversi*" did not mean the game in public estimation, at least, certainly not in the estimation of the trade, but that it meant the game as manufactured and sold by the Plaintiff.

That being so, I am clearly of opinion that in 1887, according to the evidence now before me, this was a fancy word not in common use, which was the Plaintiff's trade-mark for this game as made by him, and sold by him, and that therefore he had a perfect right to register it.

What has been done by the Defendant certainly deserves no assistance at the hands of the Court in any way. He made and sold this game, it appears, by the name "*Annex*," and having made and sold it by the name "*Annex*," I suppose he did not find the sale quite so great as that which the Plaintiff was obtaining, and so he alters his name by adding to the word "*Annex*" these words, "The New Game *Annex*," and then, in smaller letters, "A game of reverses," using the English plural word. Now the meaning and intention of that is beyond question. The Defendant found the Plaintiff was getting a very large sale for his articles, for which he had at that time a registered trade-mark, and accordingly the Defendant tried to obtain a part of that sale by putting this word "Reverses" upon his label. That is clearly a colourable imitation of the word "*Reversi*." The French word "*reverser*" has not the same meaning as the English word "reverse," and the dictionary which Mr. *Aston* was good enough to hand me, enables me to illustrate that. The word "*reverser*" in French is thus translated: "To pour out again; to pour off," and, in naval matters, "to transship, to transfer, to carry." It does not mean "to turn upside down," as in *England*. So that here is a most plain attempt to obtain a portion of the Plaintiff's custom, and to pass off the goods which the Defendant is making, as being goods which really are either made or selected or sold by the Plaintiff; and the rule has always been, since I have known anything of the profession, that where a man designedly does a thing of that kind, he will not be heard to say that this will not damage the plaintiff, because his designedly taking the trade-mark of another man shews that he expects by that to gain an advantage to himself, and, when he does, that advantage is so much damage to the other man.

I, therefore, think that the motion to strike this word off the register must be refused with costs; and as to the motion in the action, I grant an injunction to prevent the Defendant using as part of the title of his game the word "Reverses," or any other colourable imitation of the word "*Reversi*."

G. I. F. C.

The Defendant appealed against both decisions, the appeals,

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by leave of the Court, came on together, and were heard on the 16th of May, 1888.

Rigby, Q.C., and *Sebastian*, for the Appellant:—

The name "*Reversi*" ought to be removed from the register. A new name given to a new thing, being the only name by which it is known, denotes that thing, and cannot be a fancy word. The game "*Reversi*" is not patented, so anybody may make and sell it, and they can make and sell it under the name "*Reversi*," for it cannot be called anything else unless a new name is invented on purpose. This subject was discussed but not decided in *In re Leonard & Ellis's Trade-mark* (1), under a former Act. The Plaintiff here is saying, "I admit that you are at liberty to make and sell this game, but you must not call it by the same name as I do, though that is the only name it has, and it is known by that name all over *Europe*." But, moreover, "*Reversi*" is not a "fancy word," it is a description, for it suggests at once the idea of a game depending on reversing, which is the real character of the game. Then, apart from trade-mark, there is no ground for an injunction; the Defendant has done nothing to pass off his game as being made by the Plaintiff; he has only added words fairly descriptive of the game: *Linoleum Manufacturing Company* v. *Nairn* (2); *In re Palmer's Trade-mark* (3).

Marten, Q.C., and *Birrell*, *contrà*:—

This is a fancy word. It is not English, it has not in French the same meaning as the English word "reverse," and it cannot be held descriptive on account of its similarity of sound to an English word. It is not a word in common use, for it has not been used by any one except the Plaintiff: *Ford* v. *Foster* (4). Being a foreign word it is properly applied as a fancy word to a new game, and it is not descriptive: *Braham* v. *Bustard* (5); *In re Van Duzer's Trade-mark* (6). Even if we are not held entitled to a trade-mark we are entitled to an injunction to prevent the Defendant from passing off his goods as ours.

(1) 26 Ch. D. 288.
(2) 7 Ch. D. 834.
(3) 24 Ch. D. 504.
(4) Law Rep. 7 Ch. 611.
(5) 1 H. & M. 447.
(6) 34 Ch. D. 623.

COTTON, L.J.:—

The first question we have to consider, and one which has a material bearing on the other question in this case, is whether this word "*Reversi*" was properly registered as a tráde-mark. Of course, if it was not, we can order it to be taken off the register.

The only argument urged in favour of its registration is that it is a fancy word. I think that "distinctive" must apply to all the things mentioned in sect. 64, sub-sect. 1 (*c*), but it is unnecessary to enter into the question of whether "*reversi*" is distinctive, or whether it is in common use, because, in my opinion, it cannot properly be said that, within the meaning of this Act of Parliament, it is a fancy word. I adhere to what I said in the case of *In re Van Duzer's Trade-mark* (1) as to what must be shewn if a word is to be treated as a fancy word. At p. 639 I say: "To be registered it must be a fancy word; and, in order to come within that description, it must be a word which obviously cannot have reference to any description or designation of where the article is made, or of what its character is." Lord Justice *Lopes* expresses this in the words (2) "must be obviously meaningless as applied to the article in question." Lord Justice *Lindley* went a little further, because he did not say "obviously meaningless as regards the particular article," but "obviously meaningless," and then after the judgment I thought it better to call his attention to that, and, with his permission, I corrected what he had said by saying "not 'obviously meaningless,' but 'obviously not intended to be descriptive.'" Lord Justice *Lindley* accepts that by saying "Perhaps non-descriptive would be better." What he says, therefore, comes to the same thing as what Lord Justice *Lopes* said in different language.

Then is that the case here? This must be considered as a French word, for it is a word applied in *France* to a particular game. But without entering into the question as to how far a name applied to a particular game, and used for the purpose of denoting that game, could afterwards become a fancy word as applied to another and a new game, this, in my opinion, is not a fancy word within the definition we gave in *Van Duzer's Case* and

(1) 34 Ch. D. 623. (2) 34 Ch. D. 644.

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Cotton, L.J.

Leuf's Case (1) which related to "*Melrose*" and "*Electric.*" We thought that "*Melrose*" might be—although on the evidence we thought it highly improbable that it was—intended to be descriptive of the place where the article was made, and that, therefore, it was not a fancy word. Here "*Reversi,*" I agree, is not an English word, and, except as a name applied to a particular game of cards, it is not a French word. I find it given in the dictionary of the French Academy, but only as the name of that game of cards. Now, can it be said that this word obviously is not intended to describe the game with regard to which the Plaintiff uses it? In my opinion that is not so. An ordinary Englishman cannot be supposed to know the word, or to know that it had been used with regard to a particular game at cards; but I think he would consider the word "*Reversi*" to be in some way connected with reversing, and we find that word used repeatedly in the rules of the game issued by the Plaintiff in which he calls attention to how the game "*Reversi*" is to be played. He says in one place "*A.* can turn over or reverse his opponent's counter till the row is red." Again, "A player cannot reverse a row of his opponent's counters if there be any gap in it," and the word "reverse" occurs in many other places in the rules, and reversing counters appears to be the substance of the game. I think that an ordinary Englishman, not knowing foreign languages, would consider "*Reversi*" as in some way intended to describe turning over or reversing, though that is a meaning different from that of the French verb *reverser.* When we find that word used as the name of a game, in the rules of which there is such constant reference to reversing, I think, not only that the word "*Reversi*" was not "obviously not intended to describe" what was to be done in the game, but that the Plaintiff used it as descriptive of the game in connection with which he was using it—a game of reversing your opponent's counters.

Then, that being so, we come to the question of the injunction. I have always held, and I have no doubt upon the question, that if, independently of any right to a trade-mark, a person is dressing up his goods in such a way to deceive the public into the belief that they are the goods of the plaintiff, this Court ought to interfere, but here the get-up of the Plaintiff's and Defendant's

(1) 34 Ch. D. 623.

games are quite different, and in my opinion the Defendant has done nothing to pass off his article as that of the Plaintiff, unless his use of the words a "game of reverses" can be considered to have that effect. Now in both games there is a turning over of your opponent's counters so as to shew the under colour, and "a game of reverses" is, as the Defendant says, an intimation of what the nature of the game is. It is not as if the Defendant had applied the word "reverses" to a game where there was no reversing. As the Plaintiff in my opinion is not entitled to have the word "*Reversi*" as his trade-mark, and as, in my opinion, it cannot be said that the Defendant has imitated the get-up of the Plaintiff's game so as to pass off his goods as those of the Plaintiff, the order of Mr. Justice *Kay* ought, in my opinion, to be discharged, and there ought also to be an order to take the trade-mark "*Reversi*" off the register.

FRY, L.J.:—

I am of the same opinion. The first question and the only question of any substance is this: Is the word "*Reversi*" in this case a fancy word within the meaning of that expression as used in the existing *Patents, Designs, and Trade Marks Act?* In my opinion it is not. I entirely agree with, and am bound by, the definition or explanation of that word as given in the case of *In re Van Duzer's Trade-mark* (1), to which reference has been made. In that case Lord Justice *Cotton* said: "To be registered it must be a fancy word; and, in order to come within that description, it must be a word which obviously cannot have reference to any description or designation of where the article is made, or of what its character is." Similar definitions or explanations were given by the other learned Lords Justices. Lord Justice *Lopes* said: "I think a word to be a fancy word must be obviously meaningless as applied to the article in question."

In the present case it appears to me that the word "*Reversi*," by its likeness to a well-known English word, "reverse," which may be used to describe the turning over of a counter, was calculated and intended to convey, to the mind of a person who read it, a notion of the character of the game, viz., that it was a game

(1) 34 Ch. D. 623.

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which involved the turning over of the counters. I think, therefore, that the word was by no means obviously without reference to the character of the article, but has in this country a very obvious reference to the nature and character of the game.

I think, moreover, that "*Reversi*" was not a fancy word, for this further reason. The Plaintiff had invented this new game, to which he gave the name "*Reversi*." He had a very large sale for this game, and the consequence was that the word "*Reversi*" had amongst persons conversant with games come to describe this particular game. Now that which is the only name of a thing cannot, it seems to me, be a fancy word with regard to it. The word "spade" describes the thing. You can never take the word "spade" and call it a fancy word for the thing. I doubt therefore whether the word "*Reversi*" is distinctive.

Then with regard to the other point, it appears to me that there is nothing whatever from which we can infer that the Defendant had any design of passing his game off as that of the Plaintiff. I observe that there is no evidence that any single person has ever been deceived, and, therefore, I think there is no ground, independently of the trade-mark, for the injunction.

LOPES, L.J.:—

I am of opinion that the word "*Reversi*" is not a fancy word within sect. 64 of the Act of 1883, and I adhere to the definition I gave in the case of *In re Van Duzer's Trade-mark* (1) of a fancy word. The Plaintiff, therefore, is not entitled to retain his trade-mark on the register. I think it unnecessary to say anything further with regard to that point. Then with regard to the injunction, the Plaintiff not being entitled to retain his trade-mark on the register, and there being nothing to shew that the Defendant has dressed up his goods so as to pass them off as the Plaintiff's, I think that the Plaintiff is not entitled to the injunction granted to him by Mr. Justice *Kay*.

Solicitors for Plaintiff: *Radford & Frankland.*
Solicitor for Defendant: *W. H. Dale.*

(1) 34 Ch. D. 623.

H. C. J.

CANN *v.* WILLSON.

CHITTY, J.

1888

June 6, 7.

[1887 C. 143.]

Mortgagor—Mortgagee—Valuation—Loss—Action by Mortgagee against Valuers—Negligence—Misrepresentation—Damages.

An intending mortgagor, at the request of the solicitors of an intending mortgagee, applied to a firm of valuers for a valuation of the property proposed to be mortgaged.

A valuation at the sum of £3000 was sent in by the valuers direct to the mortgagee's solicitors, and the mortgage was subsequently carried out.

Default having been made in payment by the mortgagor, and a loss having resulted to the mortgagee, he commenced an action against the valuers for damages for the loss sustained through their negligence, misrepresentation, and breach of duty.

The Court being satisfied on the evidence that the Defendants knew at the time the valuation was made that it was for the purpose of an advance, and that the valuation as made was in fact no valuation at all:—

Held, that, under the circumstances, the Defendants were liable on two grounds: (1), that they (independently of contract) owed a duty to the Plaintiff which they had failed to discharge; (2), that they had made reckless statements on which the Plaintiff had acted.

George v. *Skivington* (1) and *Heaven* v. *Pender* (2) followed.

Peek v. *Derry* (3) discussed.

In 1883 one *Spark* was desirous of obtaining an advance of money on mortgage of some property he had, and he applied to Messrs. *Cann & Son*, solicitors, for the purpose of their finding a mortgagee. They informed him that he must have a valuation made of the property; and accordingly *Spark* consulted the Defendants, and asked them to make a valuation, and they thereupon surveyed and inspected the premises on the 13th of November, 1883, and by letter of that date informed Messrs. *Cann & Son* that they valued the premises, including all fixtures, at £3000, and that they were of opinion they would have no difficulty at any time in letting the property at £150 per annum.

By a subsequent letter, dated the 8th of December, 1883, the Defendants having had their attention particularly called by

(1) Law Rep. 5 Ex. 1. (2) 11 Q. B. D. 503.
(3) 37 Ch. D. 541.

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Messrs. *Cann & Son* to the purpose for which the valuation was wanted, and to the responsibility the Defendants were undertaking, stated that the valuation they had sent was in their opinion a moderate one, and certainly was not made in favour of the borrower, and that they had given Messrs. *Cann & Son* £3000 as the value, though it was a considerable reduction of the actual cost to the holder of the property.

The valuation and representations so made by the Defendants to Messrs. *Cann & Son* were in due course communicated by them to the Plaintiff and his co-trustee (who died before the commencement of the action), who, acting under the advice of their solicitor, advanced to *Spark*, upon the security of a mortgage of his property, £2045 of moneys belonging to them on a joint account.

Spark having made default in payment of the sum so advanced, and the property comprised in the mortgage proving insufficient to answer the mortgage of the Plaintiff, he accordingly commenced this action, and alleged that the Defendants at the time the above letters were written well knew, or without gross negligence must have known, that the property was not of the value of £3000, or anything like that sum, and that they did not use due and proper care, skill, and diligence in making the valuation, although they had express notice and were well aware that it was required for the purposes of a proposed advance, and in order to enable the intending mortgagees to determine and Messrs. *Cann & Son* to advise how much might be properly advanced, and further that the Defendants made the representations contained in the valuation and letters recklessly and in breach of the duty they had undertaken, even if such representations were not false to their knowledge, and the Plaintiff claimed compensation by way of damages for the loss sustained by him through the negligence, want of skill, breach of duty, and misrepresentation of the Defendants with reference to the valuation of the property.

The Defendants by their defence alleged that the valuation was made by them under instructions from *Spark*, and that at the time of making it they had not been informed, and in fact were ignorant, that it was required or intended to be used in

connection with a mortgage, and further that they were never instructed or employed to make any valuation by, or on behalf of, or received any payment or consideration from Messrs. *Cann & Son*, or their clients the Plaintiff and his deceased co-trustee, or either of them, and that they owed no duty to Messrs. *Cann & Son* or their clients, and denied that the Plaintiff had sustained any loss or damage through or by their negligence or misrepresentation.

Romer, Q.C., and *Ingle Joyce*, for the Plaintiff:—

The valuation was made by the Defendants on the instruction of *Spark*, and they knew that it was required for the mortgagees. There was a duty on the part of the Defendants to the Plaintiff, and that duty not being discharged they are liable for the loss incurred: *George* v. *Skivington* (1); *Peek* v. *Derry* (2); *Heaven* v. *Pender* (3). We were entitled to rely on the opinion of the Defendants as experts, but they never, in fact, valued at all; they only took *Sparks'* figures, and then gave a particular sum. The Defendants were not only guilty of negligence, but of fraud in this sense, that an action for deceit would lie.

[They also referred to *Donaldson* v. *Haldane* (4) and *Pollock* on Torts (5).]

Maclean, Q.C., and *E. B. Cooper*, for the Defendants:—

We were not employed by the Plaintiff, but by *Spark* alone, and at the time of the valuation *Spark* did not tell us it was for the purposes of a valuation. We were not the agents of the Plaintiff, and there was no privity between them and us. The opinion we gave on the value was given gratuitously, and therefore at law we are not liable. We acted throughout with perfect *bona fides*. With regard to the question of misrepresentation, damages cannot be obtained at law for misrepresentation which is not fraudulent: *Newbigging* v. *Adam* (6).

[They also referred to *Fish* v. *Kelly* (7).]

(1) Law Rep. 5 Ex. 1.
(2) 37 Ch. D. 541.
(3) 11 Q. B. D. 503.
(4) 7 Cl. & F. 762.
(5) Page 448.
(6) 34 Ch. D. 582, 592.
(7) 17 C. B. (N.S.) 194.

CHITTY, J. *Romer*, in reply.

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CHITTY, J. (His Lordship having stated the facts and the evidence, and having on the evidence come to the conclusion that the Defendants were aware for what purpose the valuation was made, and being of opinion that the valuation as made was, in fact, no valuation at all, proceeded):—

The question is whether under these circumstances the Defendants are liable. It is argued that the liability of the Defendants arises, first, in contract, and, secondly, on the ground on which *Heaven* v. *Pender* (1) was decided, which is this: In stating the principle I will state shortly what the facts of that case were. The plaintiff was engaged on work on a vessel in the performance of which the defendant, as dock-owner, was interested, and it was held that he was under an obligation to the plaintiff to take reasonable care that the staging and ropes supplied were fit for use, and he was held liable for the neglect of that duty. The case was a peculiar one. The defendant put up the staging. The plaintiff was a painter, employed by a contractor, who contracted to paint the ship, and had therefore entered into no contractual relation with the dock-owner, but the thing that was supplied was a staging which was so negligently constructed that it would not answer the purpose which those who supplied it knew it was intended to be used for. There was, as I say, no contractual relation between the plaintiff and the dock-owner, and there was no personal direct invitation to the plaintiff to come and do the work on that ship, yet it was held that the dock-owner had undertaken an obligation towards the plaintiff, who was one of the persons likely to come and do the work to the vessel, and that he was liable to him and was under an obligation to him to use due diligence in the construction of the staging.

In this case the document called a valuation was sent by the Defendants direct to the agents of the Plaintiff for the purpose of inducing the Plaintiff and his co-trustee to lay out the trust money on mortgage. It seems to me that the Defendants knowingly placed themselves in that position, and in point of law incurred a duty towards him to use reasonable care in the pre-

(1) 11 Q. B. D. 503.

paration of the document called a valuation. I think it is like the case of the supply of an article—the supply of the hairwash in the case of *George* v. *Skivington* (1). There the hairwash was deleterious—not deleterious for all purposes, but deleterious for the purpose for which it was intended to be used, that is to say, as a hairwash. In this case the document supplied appears to me to stand upon a similar footing and not to be distinguished from that case, as if it had been an actual article that had been handed over for the particular purpose of being so used. I think, therefore, that the Defendants stood with regard to the Plaintiff —quite apart from any question of there being a contract or not in the peculiar circumstances of this case—in the position of being under an obligation or duty towards him ; and then, I think, they failed negligently by their gross negligence to discharge that obligation.

It is not necessary, in my opinion, to decide the case with reference to the third point, but even on the third point I think the Defendants are liable—and that is what may be termed fraudulent misrepresentation. Lord Justice *Cotton* in *Peek* v. *Derry* (2) stated again the law on this subject ; and though there may be some slight differences of opinion between Judges in the way in which they state it, I think I, sitting here, may safely accept this statement, which is as follows (3) : " Although, in my opinion, it is not necessary that there should be what I should call fraud, yet, in these actions, according to my view of the law, there must be a departure from duty ; and in my opinion when a man makes an untrue statement with an intention that it shall be acted upon without any reasonable ground for believing that statement to be true, he makes default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have to have true statements only made to them. And I should say that when a man makes a false statement to induce others to act upon it, without reasonable ground to suppose it to be true, and without taking care to ascertain whether it is true, he is liable civilly as much as a person who commits what is usually called fraud

(1) Law Rep. 5 Ex. 1. (2) 37 Ch. D. 541.
(3) 37 Ch. D. 568.

CHITTY, J. 1888 CANN v. WILLSON.

and tells an untruth knowing it to be an untruth." The President of the Probate Division agreed with that statement but added that he would state the principle himself in his own words (1): "I take the law to be that if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act and is thereby damnified, the person so damnified is entitled to maintain an action for deceit." In my judgment as a matter of fact the Defendants had no reasonable ground for stating the value to be £3000, and no reasonable ground for stating that the property could then be let for £150. The statement was, I think, made recklessly. How it came exactly to be made I am unable to say. I decline to draw any inferences of fact against the Defendants upon mere conjecture. There is no evidence to shew that the Defendants were to get any advantage out of this transaction: and I do not for a moment—and I state it in order to shew that I do not—proceed on any such notion: but I think that they made this statement without any reasonable ground for it, and that it was made recklessly within the proposition which I have stated. I have entirely passed by the question of contract. It is unnecessary to decide that point. I consider on these two last grounds—and if I were to prefer one to the other it would be the second ground—that the Defendant is liable for the negligence. There must be an inquiry as to damages for the loss sustained by the Plaintiff through the negligence, breach of duty, and misrepresentation of the Defendants.

Solicitors: *Frith Needham*, for *Cann & Son, Nottingham; Scott & Co.*, for *Rhodes & Carnley, Alford.*

(1) 37 Ch. D. 578.

G. M.

RICHARDSON *v.* FEARY.

NORTH, J.

1888

May 15.

[1886 R. 1521.]

Partition—Sale—Application for Sale by Owner of less than half of Property—Discretion of Court—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 5 [*Revised Ed. Statutes, vol. xv., p.* 696].

Upon an application for a sale of property held by tenants in common, made by the owner of less than a moiety under sect. 5 of the *Partition Act*, 1868, the Court has a discretion, and is not bound to order a sale, even if none of the other persons interested will undertake to purchase the Applicant's share.

The *onus* is on the Applicant under sect. 5 to shew some good reason for ordering a sale of the property.

FURTHER CONSIDERATION of a partition action.

By her statement of claim the Plaintiff claimed a sale of the property, and division of the proceeds of sale among the persons interested, or in the alternative a partition.

The judgment at the trial, dated the 17th of March, 1887, directed an inquiry who were the persons interested in the property, and for what estates and interests, and in what shares and proportions.

By his certificate the Chief Clerk found that the Plaintiff *Elizabeth Richardson*, widow, was absolutely entitled to one undivided eighth share; that the Defendant *Neville Feary* was absolutely entitled to two undivided eighth shares, subject to some incumbrances created by him in favour of *B. Attack;* that the Defendant *Neville Feary* was entitled to another undivided eighth share as the surviving trustee of the marriage settlement of the Defendants *Thomas Cooke* and *Susanna* his wife; that the Defendant *Susanna Cooke* and her husband in her right were absolutely entitled (subject to some mortgages) to another undivided eighth share; that the Defendant *Ann Matilda Nix*, widow, was, subject to a mortgage, absolutely entitled to two undivided eighth shares; and that the Defendants *Neville Feary* and *Thomas Cooke*, as trustees of the marriage settlement of *Hannah Mendham Aiken*, were entitled to the remaining undivided eighth share.

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Farwell, for the Plaintiff:—

The *onus* is on those who object to a sale to shew some good reason why the property should not be sold, unless they are willing, in accordance with sect. 5 (1) of the *Partition Act*, 1868, to purchase at a valuation the share of the person who desires a sale. The object of the Act was to facilitate sales: *Drinkwater* v. *Ratcliffe* (2); *Williams* v. *Games* (3); *Pitt* v. *Jones* (4). In that case (5) Lord *Watson* said that, without doing any violence to its language, sect. 5 "may be read as a new and substantive enactment, empowering any party, who has made up his mind to sell his own share at a valuation, to insist for and obtain a decree of

(1) Sect. 3: "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then, if it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions."

Sect. 4: "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then, if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions."

Sect. 5: "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then, if any party interested in the property to which the suit relates requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given the Court may order a valuation of the share of the party requesting a sale in such manner as the Court thinks fit, and may give all necessary or proper consequential directions."

(2) Law Rep. 20 Eq. 528.

(3) Ibid. 10 Ch. 204.

(4) 5 App. Cas. 651.

(5) Ibid. 663.

sale, unless some of the other parties give an undertaking to purchase his interest."

Le Riche, for Mr. and Mrs. *Cooke*, supported the request for a sale.

Cozens-Hardy, Q.C., and *Leonard Field*, for the Defendants *Neville Feary* and Mrs. *Nix*; *Vernon R. Smith*, for mortgagees of *Neville Feary*; and *P. F. Wheeler*, for a mortgagee of Mrs. *Nix*; all of whom objected to a sale, were not called on.

NORTH, J.:—

In a proper case the Court could direct a sale under sect. 3 of the Act. The present application for a sale is not made under sect. 3 but under sect. 5, and it may be assumed that none of the circumstances mentioned in sect. 3 as justifying the Court in ordering a sale of the property exist here. It cannot be said that for any of the reasons mentioned in sect. 3 a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between them. Under sect. 4 it is not open to the Court to refuse a request for a sale made by a party or parties interested to the extent of a moiety in the property, "unless it sees good reason to the contrary." The words of sect. 4 are much stronger than those of either sect. 3 or sect. 5. Then sect. 5 says that, if any party interested requests a sale instead of a partition, the Court may, "if it thinks fit," direct a sale, unless the other parties interested undertake to purchase the share of the party requesting a sale. I have been asked to construe this section as if it were expressed in the same terms as sect. 4,—as meaning that, if any party requests a sale, the Court shall direct a sale unless it sees good reason to the contrary. The difference between the language of the two sections is significant, and I have no doubt that sect. 5 was intended to give the Court a different power from that which is given by sect. 4. I do not think that *Williams* v. *Games* (1) has any application to the present case. In *Drinkwater* v. *Ratcliffe* (2) Sir *G. Jessel*, M.R., said (3): "The 5th section provides that, if any

(1) Law Rep. 10 Ch. 204. (2) Law Rep. 20 Eq. 528.
(3) Law Rep. 20 Eq. 531.

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party interested in the property requests the Court to direct a sale of the property instead of a division, the Court may, if it thinks fit (this is discretionary again), unless the other parties interested in the property undertake to purchase, give all necessary and proper directions for such sale. What does that mean? Under the 4th, where the parties requesting a sale have got more than a moiety, you do not want that; it consequently applies to the case of the owners of less than a moiety making the request. Now that case is provided for by the 3rd section; in every possible case where the Court thinks a sale is proper and for the benefit of the parties interested. Therefore the 5th must apply to a case where the Court sees no reason for preferring a sale to a partition. That case is not provided for by the 3rd, nor is it provided for by the 4th section. Where the Court sees no reason at all, still any party interested may apply." That is quite a different thing from saying that, if the Court sees no reason at all for preferring a sale to a partition, it shall on the application of any party interested direct a sale. *Pitt* v. *Jones* (1) is not a direct authority on the present question, though no doubt there were some observations made by Lord *Watson* which do give some colour to Mr. *Farwell's* argument. But those observations were addressed to an entirely different question, viz., whether, where one party desired to have a sale, and the other parties were willing to purchase his share, he could be compelled to sell his share at the valuation made of it. I do not think there is anything in *Pitt* v. *Jones* which obliges me to hold that, when a power is given to the Court to direct a sale "if it thinks fit," it is compelled to order a sale, especially having regard to what Sir *G. Jessel*, M.R., said in *Drinkwater* v. *Ratcliffe* (2). And in *Pitt* v. *Jones* Lord *Blackburn* said (3): "Sect. 5 says, that in every case of a suit for partition (whether the sale would or would not be more beneficial for the parties than a partition), if any party (whether owning more or less than a moiety) requests a sale, the Court shall have a discretion to order such a sale, unless the parties opposing a sale are willing to take his share at a valuation. But it does not say, nor do I think it was intended to say, that a party who requests a sale of the whole must take that valuation; I think it means that if a

(1) 5 App. Cas. 651. (2) Law Rep. 20 Eq. 531. (3) 5 App. Cas. 659.

party presses for a sale, and the Court thinks that the opposing parties in fairness ought either to buy him out or consent to a sale, it may order a sale unless they will agree to take his share at a valuation, in which case the party requesting a sale may either accept that valuation or not. If he does not choose to accept that valuation, he cannot be forced to do so; but will then have his common law right to a partition." In those remarks, if I may say so, I entirely concur. But here the party who is pressing for a sale has not satisfied me that in fairness the parties who oppose a sale ought either to buy him out or to submit to have the property sold. The majority of the Judges in *Pitt* v. *Jones* (1) took the same view of sect. 5 as I do. Lord *Watson* no doubt went further than any of the other noble Lords, but he was not actually dealing with the present question. I think that sect. 5 is not synonymous with sect. 4, but the party who applies under sect. 5 for a sale must shew some reason for it. I think the Court has a discretion whether it will direct a sale, and no reason has been shewn to induce me to do so in this case.

Cozens-Hardy:—As between the owners of the six-eighths a partition ought not to be made, as they do not desire it.

[NORTH, J.:—What right have they to cut off a corner of the property and give it to the Plaintiff?]

The Plaintiff is entitled to his share, but he has no right to compel us to cut up the rest of the property. In making a partition it is not necessary that an aliquot share of each species of property should be allotted to each tenant in common: *Peers* v. *Needham* (2); *Hobson* v. *Sherwood* (3).

NORTH, J.:—

I see no difficulty in allotting seven parts to the owners of seven undivided eighths as tenants in common. If all the persons interested in one eighth agree with all those who are interested in another eighth that they will do so, they can remain tenants in common of those two eighths.

(1) 5 App. Cas. 651. (2) 19 Beav. 316.
(3) 4 Beav. 184.

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Cozens-Hardy:—No costs should be given up to the trial of the action: *Porter* v. *Lopes* (1).

Farwell:—The ordinary rule is that the costs should be borne by the parties rateably in proportion to their interests in the property: *Ball* v. *Kemp-Welch* (2).

NORTH, J.:—

No benefit has been derived from the *Partition Act* in the present case, and I do not see why I should depart from the old rule of the Court of Chancery. I shall give no costs up to the date of the inquiry. The subsequent costs will be borne rateably.

Solicitors: *Paterson, Snow, & Co.; Le Riche & Norman; Field, Roscoe, & Co; F. & T. Smith & Sons; H. R. Reynolds.*

W. L. C.

NORTH, J.
1888
June 5.

In re SHELDON. NIXON *v.* SHELDON.

[1881 S. 4476.]

Will—Construction—Tenant for Life and Remainderman—Unauthorized Security—Enjoyment by Tenant for Life in Specie—Power to Trustees to retain existing Securities.

A testator empowered his trustees at their discretion to continue all or any part of his personal estate in the state or investment in or upon which the same should be at his death, or otherwise to convert the same and to invest the proceeds in the names of the trustees in certain specified securities. At the death of the testator part of his personal estate consisted of securities not of a wasting nature and not specifically authorized.

In an action for the administration of the estate the Chief Clerk found that some of these securities were proper to be continued, and that others were proper to be called in:—

Held, that the tenants for life under the will were entitled to receive *in specie* the income of those unauthorized securities which were retained, and which were not of a wasting nature.

FURTHER CONSIDERATION of an action brought to administer the estate of *E. P. Sheldon*, who died on the 8th of May, 1881.

(1) 7 Ch. D. 358. (2) 14 Ch. D. 512.

By his will, dated the 15th of November, 1860, the testator appointed his brothers *John* and *Thomas*, and his sister *Sarah Anne*, executors and trustees thereof. And, after bequeathing some legacies, the testator devised and bequeathed the residue of his real and personal estate unto such of them, his two brothers, *John* and *Thomas*, and his six sisters, *Jane*, *Elizabeth*, *Arabella*, *Mary*, *Eleanor*, and *Sarah Anne*, as should be living at his decease, and such issue then living of his brothers and sisters who should have died in his lifetime as should attain the age of twenty-one years or marry, in equal shares, according to the stocks and not according to the number of individuals, and such issue taking equally, and only after the decease, and by way of representation, of their respective parents. And the testator declared that, as to the share of each of his said sisters of and in his residuary real and personal estate, the same should be retained and held by his trustees, upon trust to pay the annual income thereof to such sister during her life, for her separate use without power of anticipation, and, after her decease, in trust as she should by will appoint, and, in default of appointment, then in trust for her children as therein mentioned. The will contained the following clause: "I direct that it shall be lawful for my trustees at their discretion to continue all or any part of my personal estate in the state or investment in or upon which the same shall be at my decease, however doubtful or hazardous or limited the description or nature of the property or investment may be, or otherwise to call in and compel payment of the same, or sell and dispose of the same, and to lay out and invest the moneys to be thereby produced in the names of my trustees in any of the public stocks or funds of the *United Kingdom*, or on mortgage of real or leasehold estates in *Great Britain*, or on any securities authorized to be granted by Act of Parliament, with power from time to time to vary the same."

The Plaintiff was *Eleanor Nixon* (the wife of *Matthew Nixon*), one of the testator's six sisters, by a next friend; the Defendants were the executors and trustees of the will, and *Matthew Nixon*.

The Chief Clerk by his certificate found that the outstanding personal estate of the testator consisted of the items mentioned

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in the second schedule to the certificate. In part 1 of that schedule were set forth "the particulars of such securities as are proper to be continued," and in part 2 "those which are proper to be called in." The securities mentioned in part 1 were not such as were authorized by the power of investment contained in the will. They were not of a wasting, though they might be of a speculative, character.

Theobald, for the Plaintiff:—

The tenants for life would clearly be entitled to the whole income of the authorized securities, and the general power given to the trustees to retain securities actually existing at the time of the testator's death makes any securities which are so retained authorized securities so long as they are retained, and the tenants for life are entitled to enjoy the whole income *in specie*: *Gray* v. *Siggers* (1). But the authorities are somewhat conflicting.

Carson, for the trustees, and for the other tenants for life:—

[NORTH, J., held that the remaindermen were sufficiently represented by the trustees.]

The general rule that securities of a wasting nature ought to be converted a year after the death of the testator, and that the tenant for life is entitled only to receive interest on the proceeds of conversion, applies also to securities of a hazardous or speculative nature: *Porter* v. *Baddeley* (2). The unauthorized securities ought to be converted, and the tenants for life are entitled to receive only interest on the proceeds of conversion as from a year after the testator's death.

[NORTH, J.:—In *Porter* v. *Baddeley* the unauthorized securities were of a wasting nature. The same principle does not seem to me to apply to securities which are of a permanent nature, though they may be hazardous.]

It is a question of administration or discretion which securities should be converted and which retained, but that does not affect the rights of successive beneficial takers.

(1) 15 Ch. D. 74. (2) 5 Ch. D. 542.

NORTH, J.:—

I do not see how I can direct the retainer of the existing investments, and at the same time hold that the tenants for life are not entitled to receive the whole of the income produced by those investments. There being no wasting securities, I can see nothing to prevent the tenants for life from receiving the whole income of the securities which are retained.

Solicitors: *Hopwood & Sons; Ullithorne, Currey, & Villiers.*

W. L. C.

STIRLING, J.

1888

April 20, 21; *May* 1.

In re PALATINE ESTATE CHARITY.

[1886 P. 3008.]

Ancient Charity—Reparations, Ornaments, and other necessary Occasions of Parish Church—Surplus Rents—Erection of a Spire.

An ancient charity was founded to provide for the reparations, ornaments, and other necessary occasions of the parish church. A new parish church had been erected, and a scheme was sanctioned by which the trustees were allowed to provide for the cost of a spire, as within the words "necessary occasions" of the parish church.

THIS was a summons asking for the sanction of the Court to a scheme in reference to the surplus rents of the palatine estate situate in the parish of *St. Mary, Stoke Newington.* The charity, very ancient, the origin of it not known, was established for the benefit of the parish. In 1857, in the case of *Attorney-General* v. *Love* (1), Lord *Romilly* settled a scheme for the application of the income of the charity, about six acres of land, which had been held by trustees for the parish, and, so far as appeared in evidence, the rents were applicable "for and towards the reparations, ornaments, and other necessary occasions of the parish church of *Stoke Newington*," and they were by a decree of charitable uses made in 1638 to be so applied. In 1857 the average gross income of the charity was about £338, and the net income about £237, but owing to the erection of buildings upon the land the rents had increased to more than £800 a year, and there was a large surplus which had to be dealt with. On the application of the Attorney-General, an order was on the 26th of January, 1887, made directing that a scheme for the future management and regulation of the charity and for the application of the income thereof should be settled by the Judge. It appeared that about 1859 the old parish church of *Stoke Newington—St. Mary*—had become inadequate for the requirements of the congregation, and that a new church was erected, principally by subscriptions. In that year a deed was executed under the provisions of the statutes 8 & 9 Vict. c. 70, and 19 & 20

(1) 23 Beav. 499.

Vict. c. 55, by which the new church was substituted for the old parish church, which however remained, and had since been used as a chapel of ease. Sir *Gilbert Scott* when he designed the new church intended that it should have a spire, but, owing to want of funds, it was not at the date of consecration erected, and down to the present time the church had remained without a spire. There had been in recent years, in addition to the new *St. Mary*, four district churches erected, viz., *St. Matthias, All Saints, St. Andrews*, and *St. Faith*, for the purpose of supplying the spiritual wants of the parish of *St. Mary*, and to each had been allotted a sum of £75 a year from the income of the charity. A scheme had been prepared in compliance with the order of January, 1887, and it now came before the Court for its sanction. Questions had arisen whether any portion of the fund of the charity could be applied towards the erection of a spire to the new parish church of *St. Mary*, and whether any portion of the fund could be applied towards the payment of the salaries of the organist, singers, vergers, and other persons employed in and about the church.

Cecil H. Russell, for the Attorney-General:—

The opinion of the Court is asked upon two questions in reference to the scheme: whether any portion of the funds of the charity can, properly, be applied towards the erection of a spire to the new church of *St. Mary*, and whether the salaries of certain persons who are employed in and about the church can, properly, be paid out of the funds. It is submitted that the charity being for the benefit of the parish church cannot be apportioned, and therefore the representatives of the district churches who appear on the summons are not here as a matter of right: *In re Church Estate Charity, Wandsworth* (1). The erection of the spire does not come within the object of the trust. It cannot be said to be a "reparation;" neither can it be said to be an "ornament" in the sense in which that word is used in ecclesiastical language. That term is technical, and has been judicially interpreted to relate to the internal furniture of a church: *Liddell* v. *Westerton* (2). There are two curious decrees

(1) Law Rep. 6 Ch. 296. (2) Moore's Special Rep. 156.

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of the time of King *John* which give the earliest complete lists of the necessary furniture of an English church: *Cotton*, MS. Ceop. (1); *Peacock* on Church Furniture (2). A spire cannot be considered to be a "necessary occasion." If so, the church would not have been consecrated, and the services could not have been conducted without it. As to the salaries being paid out of the funds it may be well to refer to *Burn's* Ecclesiastical Law (3), and the cases there cited. It is submitted that the surplus funds of the charity should be ordered to be applied *cy-près*.

Hastings, Q.C., and *Boome*, for the trustees of the charity, the rector and churchwardens of *St. Mary*, and three other persons named in the scheme:—

The proposed application of the funds towards the erection of a spire is, it is submitted, within the words of the trust. A spire is an ornament, but if not it certainly comes within the words "necessary occasions." In *Woodward* v. *Makepeace* (4), it was held that bells were more than ornaments, that they were as necessary as the steeple, which was of no use without them. There are also the authorities of *Nicholson* v. *Parishioners of Woodford* (5) and *Maynard* v. *Brand* (6), in which case a monition was issued against the churchwardens requiring them to repair and reinstate in its original form the spire of a church which had been destroyed by lightning. The funds of the charity have been applied since 1681 for all the purposes to which a church-rate was applicable. No doubt the stipend of the minister could not properly be paid out of a church-rate, but it is submitted that the salaries of an organist and other persons employed in and about the church could be.

Ingle Joyce, for the vicar and churchwardens of the district churches of *St. Faith*, *All Saints*, and *St. Andrew*; and *Stuart Moore*, for the vicar and churchwardens of the district church of *St. Matthias*.

(1) D. iii. 191.
(2) Page 175.
(3) 9th Ed. tit. Church, sect. viii. (23) p. 374A.
(4) 1 Salk. 164; 3 Mod. 211.
(5) 4 Viner's Abr. sub-tit. Churchwardens (C).
(6) 3 Phillim. 501.

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The principal question which has arisen in this case is as to the proper application of the surplus rents accruing from a certain piece or parcel of land which has for a long period of time been devoted to charitable purposes. There is no evidence as to how the property was originally devoted to the charity. Upon the evidence before me the earliest document is an inquisition taken in the reign of King *Charles* I., by which it was found that the churchwardens had "tyme out of minde untill the said twentie-nynth of September, 1623, employed all the rents, issues, and profitts of the said fower acres and three roods of pasture land for and towards the reparations, ornaments, and other necessarie occasions of the said parish church of *Stoke Newington*, except only a sum which has been paid as a quit rent." The matter came before Lord *Romilly* in the year 1857, in the case of *Attorney-General* v. *Love* (1), under these circumstances. The old parish church had ceased to be used as a parish church, and a large new church had been erected at an expense of £8000, raised principally by subscriptions, and under the provisions of 6 & 7 Vict. c. 37, the new church became the parish church. The question which came before Lord *Romilly* was whether any other churches, the districts of which had been formed out of the parish of *St. Mary, Stoke Newington*, were entitled to share in the charity, and Lord *Romilly* came to the conclusion that they could not, and that it was a charity for the support of the fabric of the parish church. Upon that a scheme was framed for the administration of the charity, and under it the affairs of the charity have ever since been managed. After providing for certain expenses the surplus was devoted in general terms towards the reparations, ornaments, and other necessary occasions of the parish church of *Stoke Newington*. After providing for various matters which fall under that head, there is a very large surplus of rents accruing from the increased value of the property, and the question before me is, how is that surplus to be applied. The application on behalf of the Attorney-General is, that the surplus may be applied *cy-près*. Upon the other hand, it was contended on behalf of the persons interested in the parish

(1) 23 Beav. 499.

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church, that the charity being for the reparations, ornaments, and other necessary purposes of the parish church there can be no surplus applicable *cy-près* until all the objects of the original trust have been exhausted, and it was said that there is a purpose within the scope of the original trust to which a large portion of the fund ought to be applied, viz., the erection of a spire to the new church, which was contemplated by Sir *Gilbert Scott* in the design originally prepared by him, but which, in consequence of the want of funds, has not yet been erected. The question which I have now to decide is, whether such an application of the funds falls within the objects of the charity. I have been asked on behalf of the Attorney-General to construe the words which I have cited from the inquisition of *King Charles* very much as if they had occurred in a charter or instrument by which the charity was founded. I am not sure that that would be quite a proper mode of dealing with the case, but I propose to deal with it on that footing, and to consider whether the erection of a spire falls within "reparations, ornaments, or other necessary occasions of the parish church." I am not clear that it does not fall under one or other of the first two "reparations or ornaments." In regard to "reparations" of buildings for a charitable purpose the law is very wide, and it has been frequently laid down that the word "reparation" is not to be confined to the repairs of the old building, but may in a proper case be extended to the erection of a new building. That view was sanctioned in the case of *Attorney-General* v. *Wax Chandlers' Company* (1). Then as regards "ornaments," it was contended on behalf of the Attorney-General that that has a technical meaning, being that referred to in the judgment of the Privy Council in *Westerton* v. *Liddell* (2), according to which "the term 'ornaments' in Ecclesiastical Law is not confined, as by modern usage, to articles of decoration or embellishment, but it is used in the larger sense of the word '*ornamentum*,' which, according to the interpretation of *Forcellini's* Dictionary, is used '*pro quocumque apparatu seu instrumento*,'" and it was contended that it designates rather the internal furniture, if I may so call it, of the church than part of the fabric. I am not quite sure, however, whether that is not putting too

(1) Law Rep. 6 H. L. 1. (2) Moore's Special Rep. 156.

narrow a limit on the word "ornaments" as it occurs in this case. I observe that Sir *Robert Phillimore* in dealing with the question in his treatise on Ecclesiastical Law (1) treats "ornaments" used in a church as including decorations, and he suggests that a narrower meaning was given to the word "ornaments" by the Privy Council. Sir *Robert Phillimore* says: "Recent decisions have made it necessary to distinguish between, first, goods and furniture ornaments in the sense of *ornamenta* of the church, and, second, decorations of the church." I do not understand the Privy Council as limiting the meaning of the word to the first class mentioned by Sir *Robert Phillimore*, and I observe that even under that class he appears to have included the spire of a church (see Ecclesiastical Law (2)), and he certainly says with regard to the second class that "decorations" includes all architectural decorations (3). However, it is not necessary to say whether a spire really falls under "ornaments" or not. But it may not be immaterial to observe that organs and bells have been held to fall under the denomination of "necessary ornaments."

Then what are "other necessary occasions," if they do not include these? It seems to me that they may fairly be held to include all the purposes necessary and proper, in order that the building may fulfil the object for which it was erected—that of being the parish church of *St. Mary, Stoke Newington*. The church as designed by the architect is incomplete at the present moment. It has not got a spire, and that is the place in which to hang the bells, which are part, I think, of the necessary ornaments or furniture of the church. In the book to which I have referred, *Degge's* Parsons' Counsellor (4), the church is treated as consisting of three principal parts, one of which is the belfry or steeple, and in the case referred to of *Woodward* v. *Makepeace* it is laid down, according to the report in 1 *Salkeld*, that the bells are not really ornaments, but are as necessary as the steeple, and the bells and the steeple in that case are both treated as necessary parts of a complete parish church. I think I ought not to limit the meaning of the words "necessary occasions" to anything less than that, and I cannot accept the suggestion which was made

(1) Vol. i. p. 920.
(2) Vol. i. p. 924.
(3) Vol. i. p. 932.
(4) 6th Ed. p. 162.

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that nothing is a necessary occasion which was not so at the time the church was consecrated by the bishop. The bishop in consecrating the church had many other points to look to besides the completeness of the church. He had to have regard to the spiritual wants of the neighbourhood in which the church was erected, and he might have very good ground for consecrating and opening a church which was very far from being complete as a parish church. On these grounds I think that the spire falls within the original trust, and that a proper part of the charitable fund may be devoted to the erection of it.

There is another point on which my opinion is asked by the Attorney-General, viz., whether the salaries of the organist and certain other persons are properly payable out of the fund. The same point arose in 1857 before Lord *Romilly*, and his Lordship said with regard to it (1): "I do not know whether anything is brought before me except the question of right. If the question were before me, subject to what I might hear in reply, I should think it extremely doubtful whether the salaries to particular persons could be brought within the terms of the original foundation." As the matter was not put at rest in 1857 I should have been very willing to leave it where it is on the present occasion, but the Attorney-General now asks for a decision on the point. I have been desirous of seeing how the fund has been applied since 1638, when the records begin. I do not find that the salaries began to be paid earlier than the year 1815, when the value of property had very largely increased. In the year 1685 there was a minute stating that "whereas the rents annually arising from the parish field have heretofore been employed promiscuously with other moneys by the churchwardens, that it should have been duly appropriated and applied for the 'repair of the parish church and the ornaments thereof;' It is ordered that the said rent be employed for the use aforesaid." It seems to me that the usage is too modern and too far apart from the purpose mentioned in the early documents to allow me to hold that such payments fairly fall within the scope of the original charity. At the same time, having regard to what has happened, and the way in which the fund has been dealt with so long, and

(1) 23 Beav. 507.

the fact that the Attorney-General did not, when the matter was raised before the Court in 1857, see fit to take a binding declaration upon it, I think the existing arrangements with reference to the application of the fund should be disturbed as little as they possibly can be, and if the church authorities have entered into any binding contracts the Attorney-General will, I hope, see his way not to require them to apply the fund otherwise that it has been applied, until the termination of them.

The salaries of the sexton, and the verger, so far as their services relate to the fabric of the parish church, will be continued; but not those of the organist or assistant organist. The salary to the tuner of the organ will be right, because it is keeping in repair one of the ornaments of the church. Nothing will be allowed to the bell-ringer, but I do not exclude anything necessary for repairs of the bells, or for keeping them in proper order. The scheme will go back to Chambers with this declaration of my opinion upon the points raised.

Solicitors: *Clabon; G. & W. Webb; Few & Co.; E. F. Cross.*

T. F. M.

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Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 26, 27, 44 [*Revised Ed. Statutes, vol. xiv., pp.* 208, 209, 213]—*Forwarding to Registrar Annual List of Members and Summary—Summary in Form D.—Default—Penalty—Summons before Metropolitan Magistrate—Misleading Return—Jurisdiction—Writ of Prohibition—Rules of Supreme Court*, 1883, *Order* XLIX., *r.* 4—*Crown Office Rules*, 1886, *r.* 81.

According to the true construction of the 26th section of the *Companies Act*, 1862, the forwarding to the Registrar of Joint Stock Companies of a list of members and summary which upon the face of them purport to satisfy the requirements of the Act, is not a sufficient compliance with that section unless such list and summary are in accordance with the facts; and a metropolitan police magistrate has jurisdiction upon a summons for penalties under sect. 27 to inquire into the truth or falsehood of the statements contained in the list and summary so forwarded, and is not precluded from hearing evidence on the complaint brought before him

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merely by the circumstance that the list and summary are in accordance with the company's register.

Such register is only *primâ facie* evidence of certain matters, and upon evidence that it contained fictitious entries the magistrate would be justified in disregarding such entries, and in treating a summary based upon them as false and misleading.

But questions of nicety as to the title to shares and the right to be on the register cannot properly be determined by a magistrate upon such a summons, and with reference to such questions he ought to accept the company's register as practically conclusive.

Grosvenor Bank and Discount Company v. *Boaler* (1) followed.

BY the 26th section of the *Companies Act*, 1862, every company under that Act is required to make once in every year a list of the members of the company, which list is to state the names, addresses, and occupations of such members and the numbers of shares held by each of them, and must contain a summary specifying (amongst other particulars) the amount of the capital of the company, and the number of shares into which it is divided, the number of shares taken from the commencement of the company up to the date of the summary, and the respective amounts of calls made, calls received, and calls unpaid on each share. This list and summary is to be contained in a separate part of the register, and a copy of it is to be forthwith forwarded to the Registrar of Joint Stock Companies. By sect. 27 any company making default in forwarding such list or summary is to incur a penalty of £5 for every day's default. And by sect. 44 every insurance company must before it commences business, and also twice during every year in which it carries on business, make a statement in the form D given in the first schedule to the Act, *i.e.* one stating the capital of the company, the number of shares issued, the calls made, and the amounts received thereby, and the liabilities and assets of the company; and the company is to be liable to a penalty of £5 for every day's default in complying with this section.

On the 17th of April, 1888, two summonses were issued from the *Bow Street Police Court*, requiring this company to appear and answer two separate informations laid by a Mr. *Bernard Boaler*. One of them alleged that the company had made default under

(1) 49 J. P. 774.

sects. 26 and 27 of the *Companies Act*, 1862, in forwarding to the Registrar of Joint Stock Companies a copy of the summary of capital and shares, with a list of all persons who are members of the company, as required by sect. 26 of the same Act. The other summons alleged that the company had made default in making the statement required by sect. 44 of the same Act.

These summonses came on to be heard on the 24th of April before Mr. *Vaughan*, when counsel for the company took a preliminary objection to the jurisdiction of the magistrate to hear and determine the summonses, which was thus stated in an affidavit made by the secretary of the company:—

"That a list of members and summary as specified in sect. 26 of the said Act having been duly made and forwarded to the Registrar of Joint Stock Companies, and a statement having been made and published in the form marked D, as required by sect. 44 of the said Act (the said list and summary and the said statement being respectively made and published in accordance with the existing register of members and otherwise in accordance with the provisions of the said Act), it was not competent for the said magistrate to adjudicate upon the correctness or otherwise of the said list and summary and statement upon the following grounds: (*a.*) That by sect. 23 of the said Act the register of members is conclusive upon the question as to who are the existing members of the association, unless and until the rectification of the said register by the Court, under the provisions of sect. 35 of the said Act, be effected; (*b.*) That the said list and summary and statement having been made in accordance with the existing register of the association, as to the rectification of which special provision is made by the said sect. 35 of the said Act, it was not competent for the said magistrate to indirectly determine the correctness or otherwise of the said register, by determining as to the correctness or otherwise of the said list and summary and statement so made and forwarded to the Registrar of Joint Stock Companies, and published respectively as aforesaid; (*c.*) That the said list and summary and statement *primâ facie* complied with the provisions of sects. 26 and 44 of the said Act respectively."

On behalf of the Applicant it was alleged that although the

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copy of the list, summary, and statement might correspond with the company's register that register was itself incorrect.

The magistrate was of opinion that he had jurisdiction to hear the summonses, and he proposed to proceed with the hearing and determination thereof, but upon the application of counsel for the company, he adjourned the further hearing of the summonses in order to enable the company to obtain a decision of the High Court upon the question of his jurisdiction to proceed with the further hearing of them.

An application was accordingly made *ex parte* before Mr. Justice *Stirling* by way of motion for a writ of prohibition to restrain the magistrate from proceeding further with the hearing of the summonses (1), and *Hastings*, Q.C., and *H. Courthope Munroe*, having been heard in support of the motion, and having cited *Hedley* v. *Bates* (2) and *Jones* v. *Slee* (3), Mr. Justice *Stirling* held that he had jurisdiction to grant the prohibition, and that as a question was involved as to the capital of a company whose affairs had already been before him in Chambers, it was a proper case for the exercise of such jurisdiction. His Lordship accordingly granted a rule *nisi* for a writ of prohibition.

Cause was now shewn against the rule.

Alexander Young, for Mr. *Bernard Boaler*, shewed cause:—

There is no proceeding before the Court in which it has jurisdiction to make any order.

Under Order v., rule 9, every matter commenced in the Chancery Division, whether commenced by (*a*) writ, (*b*) originating summons, (*c*) notice of motion, or (*d*) petition, "shall be assigned to and marked with the name of one of the Judges of that Division": Central Office Practice Rules, r. 18; *Snow*'s Annual Practice, 1887–8 (4); and this matter has never been so assigned.

2. This is a criminal proceeding for the recovery of a penalty imposed by an Act of Parliament for a breach of its enactments, and this Court has no power to interfere with such proceedings, except, perhaps, where there are identical proceedings in Equity

(1) See W. N. (1888) p. 104.
(2) 13 Ch. D. 498.
(3) 32 Ch. D. 585.
(4) Pages 134, 1096.

by the same person: *Saull* v. *Browne* (1); *Kerr* v. *Corporation of Preston* (2). Even then this Court will hesitate to interfere with the ordinary proceedings of a criminal Court.

3. Again, according to the Crown Office Rules, 1886, r. 81, "an application for a writ of prohibition on the Crown side shall be made by motion to a Divisional Court for an order *nisi* in all criminal causes or matters." By these rules this Court is bound, and accordingly a Judge of this Division cannot hear such an application.

Hastings, Q.C.:—To meet any objection of that kind we have applied for and obtained a special direction from the Lord Chancellor under the Rules of the Supreme Court, Order XLIX., rule 4, that this application should be heard and disposed of by Mr. Justice *Stirling*, who has consented to do so.

Alexander Young:—That application was made *ex parte*, and there was no cause or matter to make it in.

STIRLING, J.:—If this objection is pressed I shall adjourn this application in order to give Mr. *Boaler* an opportunity of urging before the Lord Chancellor any objection he may have to my hearing it.

Alexander Young:—Then I waive the objection, and will argue the case on the merits.

There is no case in the books in which prohibition has ever been granted even in civil proceedings unless it was proved that the inferior Court had no jurisdiction or had exceeded its jurisdiction. It appears from the evidence that the claims here are for a penalty under sect. 27 for non-compliance under sect. 26 of the *Companies Act*, 1862, and for a penalty for non-compliance with sect. 44. Now by sect. 65 all offences under the Act made punishable by penalty may be prosecuted summarily before two or more justices of the peace in manner directed by 11 & 12 Vict. c. 43, and by sect. 33 of that Act one metropolitan police magistrate has power to do alone whatever is thereby authorized to be done by any one or more justices of the peace. There is therefore jurisdiction for the magistrate to determine whether the sections

(1) Law Rep. 10 Ch. 64. (2) 6 Ch. D. 463.

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of the Act have been complied with, and such jurisdiction has been frequently exercised. Then there is no evidence whatever that the magistrate has exceeded the jurisdiction he possesses, and it cannot be assumed that he is going to do anything more than the Legislature has empowered him to do.

As to the cases relied upon by the company: *Hedley* v. *Bates* (1) was the case of an action for an injunction against a defendant in a civil matter in which the injunction was granted so as to decide in one action all questions between the parties. *Jones* v. *Slee* (2) was also the case of an action, and the proceedings prohibited were civil. Here there is no action, and the proceedings sought to be prohibited are criminal.

There is, however, a decision of the Court of Queen's Bench which shews that even if a company has forwarded a list and summary to the registrar which is *primâ facie* in compliance with the requirements of sect. 26, a police magistrate has jurisdiction to examine whether or not such list and summary is misleading and not in accordance with the facts. And if he finds that it is so (as we say is the case here), then to impose a penalty under sect. 27: *Grosvenor Bank and Discount Company* v. *Boaler* (3).

Hastings, Q.C., and *H. Courthope Munroe*, for the company:—

Where, as in this case, a list of members and summary has actually been forwarded to the Registrar of Joint Stock Companies in compliance with sect. 26, then there has not been that default in "forwarding" for which alone sect. 27 imposes the penalty, and the police magistrate has no power to inquire whether or not such list and summary is in fact accurate and correct. Secondly, if he has such power, and finds that the list and summary *bonâ fide* represent the company's view of their legal position upon a certain state of facts, he has no jurisdiction to decide whether or not that view is right in law, or to determine any point of law arising with reference to such list or summary. Here the magistrate is going to inquire whether the shares were improperly issued or not, and in fact to try the question whether the register is correct or not.

(1) 13 Ch. D. 498. (2) 32 Ch. D. 585.
(3) Unreported (Q. B. D. May 12, 1885).

Misconstruction of an Act of Parliament as to a point of jurisdiction is a matter of prohibition in an inferior Court, but misconstruction of an Act of Parliament upon a matter which is within that jurisdiction is a matter of appeal: *Full* v. *Hutchins* (1); *Brymer* v. *Atkins* (2); *Gould* v. *Gapper* (3); *Veley* v. *Burder* (4); *Denaby Main Colliery Company* v. *Manchester, Sheffield and Lincolnshire Railway Company* (5). If the Court has original jurisdiction, prohibition goes as soon as it is clear that the Court must proceed to try some question upon which it has no jurisdiction, or where in the progress of a matter within the jurisdiction some point arises which the Court is incompetent to determine: *French* v. *Trask* (6); *Byerley* v. *Windus* (7); *Thompson* v. *Ingham* (8); *Shortt* on Prohibition (9). In *Leman* v. *Goulty* (10), where a Spiritual Court which had compelled churchwardens to exhibit on oath an account of the sums received and paid by them in the execution of their office, proceeded further to examine the accounts and to decide on the propriety of the charges, it was held by the Court of King's Bench that this was an excess of jurisdiction, and a prohibition was granted against the Spiritual Court even after sentence. So also where an executor, in compliance with 21 Hen. 8, c. 5, s. 4, had delivered into the keeping of the bishop an inventory of the goods and chattels of a deceased person, it was held in *Henderson* v. *French* (11) that the Consistory Court could not go into the correctness of the inventory and that a prohibition must issue; and in a similar case of *Griffiths* v. *Anthony* (12) a rule for a writ of prohibition was made absolute even though the inventory was admitted to be imperfect and inaccurate.

Again, where a statute contains a special provision for the settlement of *bonâ fide* disputes, justices cannot adjudicate upon such disputes upon the hearing of a summons for penalties for breach of the provisions of the statute: *Dixon* v. *Cockett* (13).

(1) 2 Cowp. 422.
(2) 1 H. Bl. 164, 193.
(3) 5 East, 345, 365.
(4) 12 Ad. & E. 265, 309, 314.
(5) 3 Nev. & Mac. 426, 443.
(6) 10 East, 348.
(7) 5 B. & C. 1.
(8) 14 Q. B. 710, 718.
(9) Pages 436, 456.
(10) 3 T. R. 3.
(11) 5 M. & S. 406.
(12) 5 Ad. & E. 623.
(13) 25 L. T. (N. S.) 826.

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Here the list and summary which have been delivered are in accordance with the entries in the company's register, and by sect. 35 of the *Companies Act*, 1862, special provision is made for rectification of improper entries or omissions of entries in a register; accordingly the police magistrate cannot go into any question as to the accuracy of the register upon an application for penalties under sects. 27 and 44 of that Act. Moreover, under sect. 25 any company acting in contravention of any of the provisions of that section as to the keeping of its register incurs penalties for so doing, whereas the penalties under sect. 27 are only for default in "forwarding" the list and summary—and *expressio unius exclusio alterius est.*

In all the reported cases of convictions for penalties under sect. 27 no list or summary at all had been forwarded: *Gibson* v. *Barton* (1); *Edmonds* v. *Foster* (2). Anything done under a *bonâ fide* claim of right is not a criminal but a civil matter: *Reg.* v. *Young and White* (3).

In the case of *Grosvenor Bank and Discount Co.* v. *Boaler* (4) the complaint was that a return was made of improperly issued shares, and fraud was proved; here the magistrate is being asked to decide a point of law.

[They also referred to the *Merchant Shipping Act*, 1876, sect. 36, and *Reg.* v. *Lindsay* (5).

STIRLING, J.:—I will not call upon you to reply, Mr. *Young*, but I shall put my judgment into writing.

1888. May 9. STIRLING, J.:—

In this case I have to decide whether an order *nisi* for a writ of prohibition ought to be made absolute. The facts are as follows: [His Lordship then stated the facts and continued:—] Cause has been shewn against the rule *nisi* which I granted under those circumstances, and the Respondent, although he at first questioned the propriety of such an order being made in the Chancery Division, ultimately abandoned this objection, and I have to decide the question between the parties on the merits.

(1) Law Rep. 10 Q. B. 329.
(2) 33 L. T. (N. S.) 690.
(3) 52 L. J. (M.C.) 55, 56.
(4) 49 J. P. 774.
(5) Q. B. D. April 17, 1888; 4 Times L. R. 464.

It was contended before me that the magistrate was wrong in overruling the objection upon the following grounds:—First, it was said that, inasmuch as the company had forwarded to the Registrar documents which purported to be the summary and list of members required by the Act, and which on the face of them satisfied the requirements of the Act, the magistrate had no jurisdiction to inquire further, and, in particular, was not entitled to investigate whether the alleged summary was true or false. If this objection be well founded, it follows that any company must be held to have complied with the provisions of the 26th section if it has forwarded to the Registrar of Joint Stock Companies a few sheets of paper filled up in accordance with, and so as on the face of them to satisfy, the requirements of the Act, even although every statement should be an absolute fiction, and could be proved to be such simply by comparison with the books of the company.

I am of opinion that this is not the true construction of the Act, and that a company does not comply with the provisions of the 26th section unless the list of members and summary are substantially in accordance with fact, and consequently that the magistrate had jurisdiction to inquire into the truth or falsehood of the statements contained in the summary. In fact, this point seems to have been already decided by the Queen's Bench Division, on the 12th of May, 1885, in the case of *Grosvenor Bank and Discount Company* v. *Boaler*, the papers in which have been handed to me and which I have found reported at 49 *Justice of the Peace*, p. 774; and it may be desirable to refer to the case which was stated in that matter by the police magistrate for the opinion of the Court. The case states that the company had been summoned before Sir *James Ingham*, at *Bow Street*, to answer eight summonses, for different dates in the years 1881, 1882, 1883, and 1884, which were almost identical in words with the first of the summonses in the present case, viz., that founded on the 26th section of the *Companies Act*, 1862. It then states that the matter was heard and decided on the first summons, and that penalties were inflicted by the magistrate. And after stating the due registration of the *Grosvenor Bank and Discount Company* with a nominal capital of £100,000 divided into 100,000 shares

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of £1 each, on the 1st of November, 1879, and setting out, almost in full, an agreement between an old company in liquidation called the *Grosvenor Finance Company* and the *Grosvenor Bank and Discount Company*, under which the *Bank and Discount Company* agreed to purchase and take over the business, assets, and liabilities of the *Finance Company* and certain fully paid-up £1 shares were to be allotted to each member of the old company, the magistrate goes on to state that the *Grosvenor Bank and Discount Company* on the 19th of October, 1881, filed with the Registrar of Joint Stock Companies a return which on the face of it complied with the terms of the 26th section, and which, amongst other statements, contained the following:—

"Nominal capital, £100,000, divided into 100,000 shares of £1 each. Number of shares taken up to the 11th day of October, 1881, 10,635. There has been paid up on each share 10*s*. Total amount of calls paid, £4481 5*s*."

Now, upon investigation it appeared that included in that amount of £4481 5*s*. were the several sums of £1 with which, under the agreement set out in the case, certain shares had been credited as paid up, and the magistrate held that this was a representation to the public that £4481 5*s*. in cash had come into the coffers of the company from calls, whereas in truth a call of 10*s*. on 635 shares only had been made, and all the company had received was £317 10*s*. What he says is this: "I was of opinion that the summary was misleading, inasmuch as it must be understood to represent that the *Grosvenor Bank and Discount Company* had made a call of 10*s*. on each of the 10,635 shares, and had actually received £4481 5*s*. upon such call, whereas in fact it had made a call of 10*s*. per share on 635 shares only, and received on such call not more than £317 10*s*." Then, after pointing out another default in the summary, and stating his opinion that the misrepresentation was not fraudulent, he says: "The question for the consideration of this Court is, whether the filing of the summary of capital and shares above set forth was a sufficient compliance with sect. 26 of the Act," and he requests the Court to remit the case to him with their opinion thereon, in order that he may or may not enforce the convictions.

Now the Divisional Court by the order I have before me, affirmed the convictions of the magistrate, and therefore held that although the summary on the face of it complied with the requirements of the section, yet, being false and misleading, though not fraudulent, it was not a compliance with the Act.

Secondly, it was argued that in this case the summary is in accordance with the register kept by the company under sect. 25 of the Act; that this register on the face of it satisfies the requirements of this section, and is under sect. 37 *primâ facie* evidence of any matters directed or authorized to be inserted therein; and that the magistrate could not for the purposes of the application before him inquire into the accuracy of the register without usurping functions which by sect. 35 of the Act are reserved for Her Majesty's Superior Courts, or without adjudicating upon questions which ought not to be determined or even raised in the absence of parties materially interested—viz., the shareholders on the register.

With much of the argument which was addressed to me in support of this contention I entirely agree. Undoubtedly questions of the greatest difficulty and nicety have arisen as to the title to shares and the right to be on the register, and have sometimes formed the subject of conflicting decisions, and have only been settled by the decision of the ultimate Court of Appeal. The Legislature has, by sect. 35 of the Act, conferred on the Superior Courts a summary jurisdiction with reference to these questions, or some of them, but there have been cases in which the Courts have thought the questions were of such a nature that they could not be properly determined in a proceeding under that section, but must form the subject of an action in which all parties interested might be properly represented. I cannot think that it was ever intended that such questions should be summarily disposed of by two justices of the peace or a police magistrate in the absence of the parties interested; and if, in a proceeding for penalties under sect. 27, any such inquiry were attempted to be entered upon, it would, in my judgment, be the duty of the magistrate to say that, as he could not properly determine it, he must accept the register as practically conclusive upon it.

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Whether, if the magistrate took a different view, the remedy of the parties aggrieved would be in prohibition or by way of appeal, I think it unnecessary to consider; for I cannot find in this case that the magistrate has decided to enter upon the consideration of any such question. All that he has done is to overrule a preliminary objection; and, for aught that I can see, he may well be of opinion that among the matters of complaint brought before him there are some with which he can deal without touching on any question which he cannot finally determine. All that I consider him to have decided is that he is not precluded from hearing evidence on the complaint brought before him merely by the circumstance that the summary is in accordance with the register; and in my opinion he is right in so holding.

In the first place, although, as I have already said, there may be questions as to which the magistrate cannot do otherwise than accept the register as practically conclusive, I am far from thinking that it would be correct to lay down that in no case can the magistrate inquire into the accuracy of the entries contained in it. The register is by the Act merely made *primâ facie* evidence of certain matters, and if it were shewn, for example, that the entries, or some of them, were absolutely fictitious, that persons registered as shareholders were non-existent, and that the sums entered as paid up on the shares had never been paid or agreed to be paid, I conceive that the magistrate would be justified in disregarding such fictitious entries, and holding that a summary based on them was false and misleading. I put this merely by way of example, and am not to be understood as in any way suggesting that the books of this company contain any fictitious entries whatever. But, besides this, evidence, either documentary or oral, may be forthcoming, which may throw light on the meaning both of the summary and the entries in the register. Thus, to illustrate my meaning by what took place in the case of the *Grosvenor Bank*, if entries had been made on the register in exact accordance with the statement in the summary, I cannot see that the evidence on which the magistrate relied would not have been admissible, or the conclusion at which he arrived in the slightest degree affected. For these reasons, I am of opinion

that the magistrate has not exceeded his jurisdiction. The order *nisi*, must, therefore, be discharged, and I think the costs must be paid by the company.

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Solicitors: *Alfred Howard; Rowcliffes, Rawle & Co.*

W. W. K.

WARNE & Co. *v.* SEEBOHM.

[1888 W. 768.]

1888

March 23; *April* 24; *May* 10.

Novel, "Little Lord Fauntleroy," Dramatization of—Copyright, Infringement of—5 & 6 Vict. c. 45, *ss.* 2, 3 [*Revised Ed. Statutes, vol. viii., pp.* 1152, 1153]—*Injunction.*

The Defendant dramatized the novel, "*Little Lord Fauntleroy*," and caused his play to be performed on the stage. The infringement of copyright complained of was that, for the purpose of producing the play, the Defendant made four copies of it, one for the Lord Chamberlain and three for the use of the performers, either in MS. or by the aid of a typewriter. Very considerable passages in the play were extracted almost verbatim from the novel. The Defendant claimed the right to make more copies if it should be necessary to enable him to give further representations of the play in *London* and elsewhere:—

Held, that what had been done by the Defendant constituted an infringement of the Plaintiffs' copyright, and that they were entitled to an injunction to restrain the Defendant from printing or otherwise multiplying copies of his play containing any passages from the Plaintiff's book:

Held, also, that all passages from the Plaintiff's book in the four copies must be cancelled.

AN action by the proprietors of the copyright in a novel, "*Little Lord Fauntleroy*," written by Mrs. *Frances Hodgson Burnett*, asking for an injunction to restrain the Defendant, a dramatic author, from printing or otherwise multiplying copies of the novel, and from doing any other act or thing in invasion or infringement of the Plaintiffs' copyright in the novel. The Defendant had dramatized the novel, and the drama entitled "*Little Lord Fauntleroy*" had on several occasions been represented upon the stage at the *Prince of Wales's Theatre*. An injunction was moved for on the 23rd of March, when after some discussion it was ordered that—the Defendant giving an under-

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taking not to make any more copies of his play, if the trial of the action should be advanced—the trial of the action should take place on the 24th of April, and it accordingly came on to be heard upon that day. "*Little Lord Fauntleroy*" was first published in parts in an American magazine. The book was subsequently published by the Plaintiffs in this country, where they registered the copyright.

On the 4th of February, 1888, the Defendant wrote to Mrs. *Burnett*, who was at that time staying at *Florence*, the following letter:—

"Dear Madam,—I write to tell you I have taken the liberty of writing a little comedy in three acts, the motive of which has been suggested to me by your most charming story, '*Little Lord Fauntleroy*.' I have, however, retained most of the characters, and have let them remain just as you have so beautifully sketched them, with the exception of the boy *Cedric*, whom I have had to make a little older. I have naturally had to invent a large amount of fresh plot and action in order to develop the dramatic intensity of the theme, but I assure you that in doing so I have striven my utmost to handle the material at my command as delicately as possible, and sincerely trust I have written nothing that could cast a slur on one of the most beautiful stories it has ever been my pleasure to read. The comedy, which I intend playing at an experimental performance at an early date, has been most highly spoken of by those critics who have read it, and I trust, my dear Madam, that in its production I shall receive your complete sanction."

Mrs. *Burnett* replied, by telegram:—"The dramatic right to '*Fauntleroy*' is legally reserved. It must not be infringed. Have dramatized myself." And afterwards by the following letter:—

"Dear Sir,—Your letter, to which I have just telegraphed reply, was a great surprise to me. On the titlepage of each copy of '*Lord Fauntleroy*' is printed 'All rights reserved.' This, I have been informed by authority, legally secures to me the dramatic right, and enables me to protect myself if it is infringed. My object in taking this precaution was to dramatize

the story myself. This I have already begun to do. You will see that it would be out of question to expect my consent to the production of a play founded upon my work without the slightest reference to my rights or consultation with me. . . . It is my wish to do the work myself, and it certainly would seem my right to do it, even in these days, when the work of one's brain, the power that cannot be bought and the professional skill that cannot be taught, are the things which seem least one's own."

In reply to the telegram the Defendant wrote as follows:—

"Dear Madam,—Your telegram to hand. You appear to be labouring under some delusion as regards the reservation of the dramatic rights of your story. By the English law any one may adapt for stage representation any novel, story, or tale published either by itself or in a magazine or journal. The author of the story can prevent the play from being printed and sold as a book, but he or she cannot prevent it being acted. The only way in which the author of a story can reserve for himself the stage rights is by dramatizing it and publicly representing it before its publication as a book. As there is no record of your story having been produced as a play previous to its publication as a book, I am afraid, my dear Madam, you cannot reserve for yourself the sole right of dramatizing it. Moreover, the comedy I have written is not a dramatic version of your story; it is only suggested by it; the best part of the plot and dialogue, and nearly all the situations, are quite original. I am exceedingly sorry, my dear Madam, that I should have to do anything that is opposed to your wishes, but when you come to consider the matter not only from a legal, but from a practical point of view, I trust that you will see the matter in a different light."

Further correspondence followed, and in one letter the Defendant offered Mrs. *Burnett* a share of the profits, but still she refused her sanction to the dramatization by the Defendant of her book. Notwithstanding what had passed, the Defendant proceeded to arrange for the performance of the play, and the Defendant wrote to Mrs. *Burnett* announcing that it had been produced at the *Prince of Wales's Theatre* with immense success. The evidence shewed that the names of the principal characters

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in the play were the same as those in the novel; that the principal situations in the novel were reproduced in the play; that the plot of the play was in all its salient points identical with that in the novel, and that all the principal ideas were taken from the novel; that a considerable portion of the dialogue, especially the artless sayings of the "*Little Lord*," which formed the chief attractions of the novel, were taken, in many instances, word for word from the book, and in other parts of the play explanatory and descriptive passages in the novel were introduced in the form of dialogue. Four copies of the play had been made, and one of them had been sent to the office of the Lord Chamberlain. It was stated that Mrs. *Burnett* had a large interest in the copyright.

Hastings, Q.C., and *E. F. Studd*, for the Plaintiffs:—

The only issue to be tried is whether the copies which have been made are an infringement. The right to represent the play upon the stage it is not sought to interfere with in any way, but it is submitted that the making of the copies is an infringement of the copyright in the novel. That passages in the book have been taken and adapted in the play is clear from an examination. Taking the first act for comparison, the play is in fact substantially a copy or reproduction of the novel. The case clearly comes within the decision of *Ager* v. *Peninsular and Oriental Steam Navigation Company* (1). The cases of *Coleman* v. *Wathen* (2) and *Murray* v. *Elliston* (3) shew that representation upon the stage, accompanied by appropriate action and recitation, is not a publication or multiplying of copies within the statute. The other side will no doubt rely upon the case of *Reade* v. *Conquest* (4), which followed those cases, but the action in that case seems to have been brought under sect. 15 of the *Copyright Act* of 1842. It is not, however, the form which the copy assumes which infringes the copyright, but the substance of it. If in the form of a play, that is an infringement and a piracy of the book, and it is not the less so because it has assumed the form of a play: *Tinsley* v. *Lacy* (5). It is not sought to interfere with the

(1) 26 Ch. D. 637.
(2) 5 T. R. 245.
(3) 5 B. & Ald. 657.
(4) 9 C. B. (N.S.) 755; 11 C. B. (N.S.) 479.
(5) 1 H. & M. 747.

representation of the play, but the four copies which have been made, and which constitute an infringement of the Plaintiffs' rights—no matter what the Defendant intends to do with them—ought to be ordered to be given up to the Plaintiffs. Comparing the novel with the play, there has been an infringement, and the Plaintiffs are entitled to an injunction to restrain the invasion of their statutory rights. Damages are not asked for. [*Toole* v. *Young* (1), *Novello* v. *Sudlow* (2), and *Hogg* v. *Scott* (3) were also referred to.]

Buckley, Q.C., and *Lewis Coward*, for the Defendant:—

It is beyond dispute that the Defendant is entitled, as a matter of law, to dramatize the novel. The action, obviously, was not brought merely to prevent half-a-dozen copies being made, but it was an attempt to prevent the introduction of the play on the stage, and the performers from learning their parts. The object was, not to compel the purchase of so many copies of the novel, but to take from the drama the parts to be learnt. The question is whether the Plaintiffs are entitled to any such right. Infringement is a matter of degree. The whole play should be read, and the Court must consider how much was taken from this novel; for what purpose; and with what view the copies were prepared. The question for decision is, it being granted that it is lawful for the Defendant to dramatize the novel, whether the Defendant can or cannot write his play. It is argued that he cannot make a single copy. But he must write his play in dramatizing—he could not commit it to memory, or send for the stage manager and recite it to him for his opinion. If considered to be good for production on the stage, would the performers have to learn their parts from the author's dictation? The drama must be written. There must be a copy at least, for the law requires that one shall be sent to the Lord Chamberlain. A person may write that which he conceives, and that is not a multiplying of copies. That is the result of the decisions in *Reade* v. *Conquest* (4) and *Tinsley* v. *Lacy* (5).

(1) Law Rep. 9 Q. B. 523.
(2) 12 C. B. 177.
(3) Law Rep. 18 Eq. 444.
(4) 9 C. B. (N.S.) 755; 11 C. B. (N.S.) 479.
(5) 1 H. & M. 747.

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It is a fallacy to say that multiplying alone is an infringement of the statute. There must be an investigation for the purpose of seeing whether the production of copies interferes with the sale of the book: *Scott* v. *Stanford* (1). The Plaintiffs' complaint in this case was trifling. The Defendant might have bought a few copies of the novel and arranged his play in the use of them by the application of scissors and paste. It may be that the Defendant's play has interfered with the sale of six copies of the book—so small a matter that the Court would not take notice of it. In *Novello* v. *Sudlow* (2) there was clearly an infringement, as each of the four parts of the song was taken, and a great many copies of the music were made. The plaintiff in that case was deprived of the benefit which he expected. The question determined there was that there had been a multiplying, but not for sale or exportation, and that sects. 2 and 3 of the *Copyright Act*, 1842, were not cut down by sect. 15. *Ager* v. *Peninsular and Oriental Steam Navigation Company* (3) was also a clear case of an infringement of the plaintiff's copyright.

Hastings, in reply, referred to the case of *Chatterton* v. *Cave* (4).

1888. May 10. STIRLING, J.:—

This is an action brought by the proprietors of the copyright in a novel, or tale, written by Mrs. *Frances Hodgson Burnett*, and entitled "*Little Lord Fauntleroy*," to restrain an alleged infringement of their rights, by the Defendant, who is the author of a play also entitled "*Little Lord Fauntleroy*." The Defendant has, in fact, dramatized the novel and caused his play to be performed on the stage. Of this the Plaintiffs do not complain: the alleged infringement consists in this—that for the purpose of producing the play the Defendant has made four copies of the play either in manuscript or by the aid of a typewriter. One of these copies has been deposited with the Lord Chamberlain; the other three have remained in the possession of the Defendant or the persons employed by him in the representation of the piece. Copies of the novel and of the play have been put in evidence. It was

(1) Law Rep. 3 Eq. 718.
(2) 12 C. B. 177.
(3) 26 Ch. D. 637.
(4) 3 App. Cas. 483.

admitted at the bar, and I have satisfied myself by actual comparison, that very considerable passages in the play have been extracted almost verbatim from the novel. Thus, in the first act there are 674 lines, of which forty-seven consist of stage directions. Deducting them, there are 627, of which 125 (or about one-fourth) are taken from the novel. Some of the passages so extracted are prominent and striking parts of the dialogue contained in the novel. It is not stated in the pleadings, but was admitted at the bar, that the Defendant claims the right to make such further copies of the play as may be necessary to enable him to give further representations of his piece in *London* and elsewhere. I have now to decide whether the Plaintiffs are entitled to complain of what the Defendant has done and intends to do; and, if so, to what relief they are entitled. It was not disputed that the Plaintiffs' title depends on statute. There have been three principal Acts of Parliament on the subject of copyright. By the earliest (8 Anne, c. 19, s. 1) there was conferred on authors the sole right and liberty of printing and reprinting. In the second (54 Geo. 3, c. 156, s. 4) copyright is styled "the sole liberty of printing." The Act now in force (5 & 6 Vict. c. 45) defines (sect. 2) copyright to be "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." And by sect. 3 it is enacted that "the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall . . . be the property of such author and his assigns." By sect. 2 the word "book" is to be construed to mean and include "every volume, part, or division of a volume." Notwithstanding the language of the Act, not every verbatim reprint of part of a book is an infringement of copyright. In the words of Lord *Hatherley* in *Chatterton* v. *Cave* (1): "Books are published with an expectation, if not a desire, that they will be criticised in reviews, and if deemed valuable that parts of them will be used as affording illustrations by way of quotation, or the like—and if the quantity taken be neither substantial nor material, if, as it has been expressed by some judges, 'a fair use' only be made of the publication, no wrong is done and no action can be brought." In

(1) 3 App. Cas. 492.

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Tinsley v. *Lacy* (1) the question arose whether it was a fair use of a novel to print and publish a drama founded on it. In that case it was proved that a portion of the drama, including the most striking incidents and much of the actual language, had been taken bodily from the novel. And it was in evidence that the profit on the publication of the play had been almost inappreciable. Nevertheless, a perpetual injunction was granted against the printing and publishing of the play without any preliminary inquiry as to damages. In giving judgment Lord *Hatherley* (at that time Vice-Chancellor) said: "Although it is open to any actor or declaimer to recite a poem or other work written by another as publicly as he pleases, it could scarcely be said that he would be at liberty, on the occasion of his recitation or performance, to distribute copies of the work for sale among the audience; nor could it be any excuse to say that the copies were intended merely to assist the audience, who desired, while listening to the recitation, to have a copy of the words in their hands." In *Novello* v. *Sudlow* (2) it was decided that the printing or multiplying copies of a piece of music not for sale but for gratuitous distribution among the members of a musical society was a violation of the right of property vested in the owner of the copyright in the piece. It must therefore follow that the gratuitous distribution among the audience of copies of a poem or other work which an actor or declaimer thought fit to recite in public would be an infringement of the copyright therein. This being so, I am unable to see that the multiplication of an indefinite number of copies of a play (which, if printed and published, would be an infringement of copyright) for the purpose of enabling that play to be publicly represented can be otherwise than an infringement. It was said, however, that anyone has a right to dramatize a novel—that is, not merely to conceive but to write dramas and to do everything necessary for that purpose, including the making of a copy for the Lord Chamberlain. In my opinion that is a fallacious mode of stating the right. The statute confers on the author of a book and his assigns "the sole and exclusive liberty of printing or otherwise multiplying copies" of the book. By implication every person other than

(1) 1 H. & M. 747, 751. (2) 12 C. B. 177.

the author and his assigns is prohibited from printing or otherwise multiplying copies of the book. But this is the only restriction imposed on the public, and, subject to it, every person is free to make such use of the book as he pleases. So long, therefore, as he does not print or otherwise multiply copies of the novel, any person may dramatize it, and may cause his drama to be publicly represented. But if, for the purpose of dramatization, he prints or otherwise multiplies copies of the book he violates the rights of the author no less than if the copies were made for gratuitous distribution. The authorities appear to me to be consistent with this view. In the early cases of *Coleman* v. *Wathen* (1) and *Murray* v. *Elliston* (2) (which established that the representation in public of a drama previously printed and published was not an infringement of the author's copyright), the point raised in the present action could hardly have arisen, for they were decided at a time when the statutes in force conferred only the exclusive right of printing. It is unlikely that any copies (other than manuscripts) were used for the purpose of the representation of the plays which were the subject of those actions; and such manuscript copies would not have been infringements of the author's rights. The case most relied upon for the Defendant was *Reade* v. *Conquest* (3). It was decided on a demurrer to a count of the declaration which alleged that the defendant without the consent of the plaintiffs dramatized the plaintiffs' book, and publicly represented and performed or caused to be represented and performed as a drama the said book. The declaration did not allege that the defendant printed or otherwise multiplied copies of the book. In the course of the argument the defendant's counsel said (4): "It is not suggested here that the defendant multiplied copies of the plaintiffs' book. The complaint is, that the defendant has dramatized the story and caused it to be represented at his theatre." In giving judgment, Mr. Justice *Williams* said: "The right claimed by the plaintiff was two-fold. First, he contended that his statutable right was infringed by the act of the defendant. It was held, however, in the case of *Coleman* v. *Wathen* that representing a

(1) 5 T. R. 245.
(2) 5 B. & Ald. 657.
(3) 9 C. B. (N.S.) 755; 11 C. B. (N.S.) 479.
(4) 9 C. B. (N.S.) 764, 765.

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public dramatic piece of the plaintiff's upon the stage was not a publication within the meaning of the 8 Anne, c. 19, so as to subject the defendant to the penalty imposed by the statute. And the 2nd section of the 5 & 6 Vict. c. 45, defining 'copyright' to mean 'the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied,' seems to furnish a complete answer to the plaintiff's claim under the statute." That case, therefore, seems to me to have been decided on the ground that the plaintiff's statutory right of multiplying copies of his book was not infringed. In the present case I am of opinion that if the Defendant had caused his play to be printed and published there would have been as substantial an infringement of the Plaintiffs' right as occurred in the case of *Tinsley* v. *Lacy* (1), and, for the reasons already given, I think that what has been done and is intended to be done by the Defendant constitutes an infringement of the Plaintiffs' legal rights no less than if the Defendant had printed and published his play; and, notwithstanding the smallness of the damage, I consider myself bound by the authority of *Tinsley* v. *Lacy* to grant a perpetual injunction to restrain the Defendant from printing or otherwise multiplying copies of his play containing any passages copied, taken, or colourably altered from the Plaintiffs' novel or tale entitled '*Little Lord Fauntleroy*," so as to infringe the Plaintiffs' copyright therein. I have introduced the last words purposely, because, as was pointed out in the course of the arguments, there is a possible mode by which, without infringing the Plaintiffs' copyright, the Defendant may be able to make copies of the play. The Plaintiffs further insisted on an order directing the delivery up for cancellation of the existing copies of the play, and they relied on the decision in *Hole* v. *Bradbury* (2) that the Court has power under its general jurisdiction to order delivery up for destruction of all articles created in violation of the Plaintiffs' rights. In that case, however, as I understand the facts, the whole of the work complained of was an infringement of the plaintiff's rights. In the present case, however, upon an examination of the play, I have come to the conclusion that it

(1) 1 H. & M. 747. (2) 12 Ch. D. 886.

may not be impossible for the Defendant to sever the passages which he has extracted from the novel from the rest of his work, and if he desires it I will give him an opportunity of doing so. He must, however, first state upon oath what copies of the work exist; secondly, extract from those copies which are in his possession or power, and deliver up to the Plaintiffs for cancellation, all passages copied, taken, or colourably imitated from the Plaintiffs' book; thirdly, produce to the Plaintiffs, if required by them for examination, the copies after the pirated passages have been extracted, and there must be liberty for the Plaintiffs to apply for a further order if they are dissatisfied with the result. The costs of the action must be paid by the Defendant.

Solicitors: *Kaye & Guedalla*; *Williams & James.*

T. F. M.

C. A.
1888
NORTH, J.
May 5.
C. A.
May 17.

In re HORNE'S SETTLED ESTATE.

[1888 H. 1126.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 58, *sub-s.* 1 (*ix.*), 59, 60, 63—*Direction for Postponed Sale—Contingent Interest—Tenant for Life—Persons entitled concurrently—Trust for Accumulation.*

Devise in 1874 of real estates to trustees upon trust for sale, but with a direction that testator's *M.* estate should not be sold until the expiration of twenty-one years from the date of his will; for the purpose of transmission the real estate to be impressed with the quality of personalty from the time of his death; the rents of the real estates previous to conversion to be applied in the same manner as the income of the proceeds of sale; after payment of debts and legacies the surplus proceeds of sale to be invested and (in the events that happened) the capital to be held in trust for all the testator's children who being sons should attain twenty-five, and being daughters should attain twenty-five or marry under that age, and if more than one in equal shares. The trustees were empowered to apply the whole, or such part as might be required, of the annual income of the share to which any child might be entitled in expectancy for his or her maintenance or education, with a direction to accumulate the unapplied surplus of the income in augmentation of the share whence such income should have proceeded, and eventually to devolve in the same manner. Death of testator in February, 1888, leaving six children, two sons who had attained twenty-one, but were under twenty-five; and three sons and one daughter, who were infants.

Held, that the children could not exercise the powers of tenants for life over the *M.* estate, and that that estate could not be sold either under sects. 63, 58 or 59.

Per North, J.:—There was no trust or direction for sale within sect. 63. Costs allowed out of the settled property.

ORIGINATING SUMMONS under the *Settled Land Act*, 1882.

William Horne, by his will, dated the 17th of June, 1874, devised and bequeathed his real estate and his personal estate not otherwise disposed of to his wife and *Benjamin Worthy Horne* (whom he had appointed executors of his will), their heirs, executors, administrators, and assigns respectively, upon trust that they should sell his real estate, and convert into money such parts of his personal estate as should not consist of money; "provided always, and I direct that, notwithstanding anything hereinbefore contained, my freehold property at *Matfield* shall not be

sold until the expiration of twenty-one years from the date of this my will, and that, so long as my wife shall remain my widow, no part of my estate hereinbefore devised and bequeathed in trust for sale and conversion shall be converted, except my household furniture and effects at *Matfield*, except so far as may be necessary for the payment of my debts, funeral and testamentary expenses, without the consent in writing of my said wife." In case any sale should be necessary for the purposes aforesaid, no part of the real estate was to be sold until the personal estate not thereinbefore specifically bequeathed should have been exhausted. And the testator declared that real estate should for the purpose of transmission be impressed with the quality of personalty from the time of his death. During such interval of postponement the trustees or trustee were empowered to let his real estates, or any part thereof, as therein mentioned. And he directed that the rents and profits or other income produced from every and any part of his real or personal estate previously to the conversion or collection thereof pursuant to the trusts thereinbefore declared, should be applied in the same manner as the income of the proceeds of sale. Out of the proceeds of sale and any money to which the testator should be entitled at his death the trustees were directed to pay debts, funeral and testamentary expenses, and to invest the surplus and pay the income thereof to his wife during her life or widowhood. After her death, or remarriage, the residuary trust estate was to be held in trust for all his children, or any his child, who being sons or a son should have attained or should attain the age of twenty-five years, or being daughters or a daughter should have attained or should attain that age, or should have married or should marry under that age, and, if more than one, in equal shares. And the testator empowered his trustees to apply the whole or such part as might be required of the annual income of the share or interest to which any child might be entitled in expectancy under the trusts aforesaid for or towards his or her maintenance or education. And he directed his trustees to accumulate the unapplied surplus of such income in augmentation of the share, interest, or capital whence such income should have proceeded, and eventually to devolve in like manner.

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The testator's wife died before him, and on the 10th of March, 1882, by a codicil to his will he appointed his brother *H. P. Horne* to be a trustee and executor of his will in place of his wife, jointly with his brother *B. W. Horne*.

The testator died on the 26th of February, 1888. He left six children, viz., two sons, who had attained twenty-one, but were under twenty-five, and three sons and a daughter who were respectively infants.

The summons was taken out by the six children (the infants by their testamentary guardian) as Plaintiffs, against the trustees as Defendants, asking for a declaration as regarded the *Matfield* property that the infants might be declared to be tenants for life respectively, or persons who, if of full age, would have the powers of tenants for life respectively under the will, within the meaning of the *Settled Land Act*, 1882, sects. 58, sub-sect. 1 (ix.) and 59, or, in the alternative, a declaration that the Applicants together constituted the tenant for life within the meaning of sect. 63; and for the opinion of the Court, whether, having regard to the provisions contained in the will prohibiting the sale of the settled estate, the trustees were at the present time trustees of the settlement made by the will for the purposes of the Act; that, if necessary, the trustees might be appointed trustees of the will for the purposes of the Act, and that all the powers conferred by the Act upon a tenant for life might be exercised by the trustees on behalf of the infants during their respective minorities, and that they might be at liberty to join in selling the settled estate on behalf of the infants.

The summons was heard before Mr. Justice *North* on the 5th of May, 1888.

H. Warlters Horne, for the Plaintiffs:—

The Plaintiffs together constitute "the tenant for life" within the meaning of sub-sect. 1 of sect. 63 (1) of the *Settled Land Act*,

(1) Sect. 63, sub-sect. 1: "Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court-roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or

1882, of the estates devised by the will in trust for sale: *In re Powell* (1). The Plaintiffs are "for the time being beneficially entitled" to part of the income of the land, or to the whole of it, if the trustees think fit. The land is now "subject to a trust for sale," though there is a direction to postpone the sale for a limited period. The object of the *Settled Land Act* was to make settled land saleable by the person who is entitled to the income, and, if sect. 63 does not apply to such a case as the present, the result will be that the Act may always be evaded in the case of a settlement by way of trusts for sale by directing that no sale shall take place during the lives of a number of young persons. In *Wheelwright* v. *Walker* (2) the trust for sale did not arise until after the death of the grandson of the testator, who was tenant for life. The estate was not at once converted in equity, as it is in the present case. Sect. 63 does not say that the trust must be for sale immediately.

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disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement."

By sub-sect. (2): "In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except" as thereinafter provided.

(1) W. N. 1884, p. 67.

(2) 23 Ch. D. 752.

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If sect. 63 does not apply, either (1) sub-sect. 1 (ix.) of sect. 58 or sect. 59 applies.

L. L. Shadwell, for the trustees of the will:—

The eldest son of the testator is his heir-at-law, and is as such entitled to the land on failure of the trusts, and he is capable of dealing with his interest: *In re Wells* (2); *In re Morgan* (3).

NORTH, J.:—

I do not see my way to making the order which is asked for under any of the sections of the Act which have been referred to. Sect. 63 is headed "Settlement by way of trusts for sale;" its application to the present case turns upon the question whether the *Matfield* property is "subject to a trust or direction for sale." The will contains a trust for sale followed by a proviso or direction that the property is not to be sold until the expiration of twenty-one years from the date of the will, and there is a further restriction in the shape of a direction that there is to be no conversion so long as the testator's wife shall remain his widow. The latter restriction is at an end, because the wife is dead.

(1) Sect. 58, sub-sect. 1: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely): (*int. al.*)

"(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to the expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event."

Sect. 59. "Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof."

Sect. 60. "Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

(2) W. N. 1883, p. 111.

(3) 24 Ch. D. 114.

Under the circumstances I think there is not any "trust or direction for sale" within the meaning of sect. 63. If you omit the proviso no doubt there would be a trust for sale. But, if you read the proviso (and it is part of the will) there is no trust for sale until the expiration of the period mentioned in it. I do not think that the testator's declaration that real estate is for the purpose of transmission to be impressed with the quality of personalty from the time of his death confers any power of sale at the time of his death. In my opinion there is no trust for conversion at the present time.

It appears to me that the interest of the Plaintiffs is not such as to bring them within sub-sect. 1 (ix.) of sect. 58. None of the Plaintiffs has yet attained the age of twenty-five, and therefore none of them has yet acquired an absolute interest under the trusts of the will. The maintenance clause only authorizes the trustees to apply "the whole or such part as may be required" of the annual income of the share to which any child may be entitled in expectancy for his or her maintenance or education, and the surplus is to be accumulated—not necessarily for the benefit of the child for whose maintenance that income is applied; but—"in augmentation of the share whence such income shall have proceeded, and eventually to devolve in like manner," that is, possibly for the benefit of a different person. It appears to me that none of the Plaintiffs are, within the meaning of sub-sect. 1 (ix.), "entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life." I am not aware of any case exactly in point, and none has been cited to me, but I think the principle of *In re Atkinson* (1) applies.

Then it is said that under sect. 59 the infants are to be deemed tenants for life of the estate, and that the powers of a tenant for life under that Act can be exercised on their behalf by the trustees of the will. But it is clear that they are not as yet entitled in possession to the estates; their interests, as I have already pointed out, are at present contingent, and they are not entitled to the receipt of the rents and profits. They cannot, therefore, be deemed to be tenants for life of the estate. I do

(1) 30 Ch. D. 605; 31 Ch. D. 577.

C. A. 1888 *In re* HORNE'S SETTLED ESTATE.

not see how any title can at present be made to a purchaser of the estate.

H. Warlters Horne, asked that the costs of the application might be paid out of the settled estate. Sect. 46, sub-sect. 6, gives power to order this even in the case of an unsuccessful application.

NORTH, J., said that in his opinion the trustees might properly pay the costs out of the settled estate.

W. L. C.

C. A.

From this decision the Applicants had appealed. The appeal was heard on the 17th of May, 1888.

Crackanthorpe, Q.C., and *H. Warlters Horne*, in support of the appeal:—

Admitting that the Applicants cannot be said to be entitled in possession to this land, we say that they are the persons absolutely entitled in equity to the income of the estate until it is sold, and are to be deemed to constitute together the tenant for life thereof within sect. 63. The rents and profits are to be applied at the discretion of the trustees for the maintenance and education of the children, and such part as is not so applied is to be accumulated for the benefit of the children until they attain twenty-five, but if none of the children attain that age then the accumulations will go to the testator's heir-at-law, his eldest son.

[They cited *In re Powell* (1).]

L. L. Shadwell, for the trustees.

COTTON, L.J.:—

I think we cannot make the order asked for. I do not differ from Mr. Justice *North*, but I base my decision on this, that the present Applicants can in no way be considered tenants for life under sect. 63, because they cannot be said to be beneficially entitled to the land or the income until sale. The testator here has given the trustees discretionary powers of maintenance for

(1) W. N. 1884, p. 67.

the children entitled in expectancy, subject to which the unapplied surplus of the money is to be accumulated. The accumulations will not necessarily be for the benefit of the children for whom the income was applied, and therefore the children are not together entitled beneficially to the income. If all the Applicants should die under the age of twenty-five, then the accumulations of income will go to the heir-at-law of the testator, but it cannot be said that he is now beneficially entitled to the income. In my opinion the present Applicants have no right to assert that they are entitled to the land or the money arising therefrom, and therefore they are not entitled to the order for which they ask.

FRY, L.J.:—

I am of the same opinion. I think the Applicants cannot succeed. I am very much inclined to adopt the view taken by Mr. Justice *North*, that sect. 63 does not apply, because the trust for sale is postponed. The trust is postponed for twenty-one years, and it is quite open to possibility that the trust may fail, if, for instance, all the Applicants should die under the age of twenty-five. I do not think that it is a trust for sale under the section. I also agree with what has been said by the Lord Justice that there is no one at present beneficially entitled to the income, within the latter part of the section.

LOPES, L.J.:—

I am of the same opinion. I should have doubts whether this case could be brought within the earlier part of that section. I am clear that it does not come within the latter part. The appeal must therefore be dismissed.

Solicitors: *Horne & Birkett.*

F. G. A. W.

C. A.
1887
KEKEWICH, J.
Nov. 24, 25, 28, 29, 30; *Dec.* 1, 2, 3, 5, 6, 21.
C. A.
1888
May 1, 3, 4, 5, 7, 18.

SIDDELL *v.* VICKERS.

[1886 S. 3299.]

Patent—Provisional Specification—Complete Specification—"Distinct statement of the invention claimed"—Patents, Designs, and Trade Marks Act, 1883, *s.* 5, *sub-s.* 3, 4, 5.

The enactment in sect. 5, sub-sect. 5, of the *Patents, Designs, and Trade Marks Act*, 1883, that a complete specification must end with a distinct statement of the invention claimed, is directory only, and when letters patent have been granted, they will not be invalid because it has not been complied with.

A patent is not rendered invalid by the fact that the complete specification describes something different from anything specifically referred to in the provisional specification, provided, that what is so described comes within the nature of the invention described in general terms in the provisional specification.

Decision of *Kekewich*, J., affirmed.

THIS was an action to restrain infringement of a patent for "An improved mechanical appliance for working or operating on large forgings in iron or steel."

The provisional specification (omitting the formal parts) was as follows:—

"This invention relates to the construction and application of an improved and more simple and effective mechanical appliance or means for working or operating on large forgings in iron or steel, being such forgings as are usually made under a hydraulic forging press or machine.

"My improved appliance consists of a horizontal bar or bars made of suitable metal and fitted with suitable pulleys and hooks, which bar or bars can be placed or fitted on either side of the cross head of the forging-press or through the 'pellet' or key-way.

"Clips, or grips, or ratchets are conveniently arranged so as to fix on or hold the ingot or forging, and hooked on the ratchet, or clip, or grip; and in operating, when the press lifts up or is raised, the ingot or forging will be turned as much as required at every stroke or operation of the press.

"The crank bar of the press in connection with the wheel and

endless chain thereof will raise the forging from the anvil at the same time that the clip, or grip, or the ratchet is turning over the forging, the ratchet being suitably fixed for turning the crane wheel over which the endless chain passes.

"The ratchet has a chain attached to the crane girder which will travel along a horizontal bar suitably fixed for the purpose, and will turn over the ingot or forging in the furnace."

By his complete specification the Plaintiff, after stating the general object of his invention in substantially the same terms as par. 1 of his provisional specification, proceeded to say that in order that the carrying out of his invention in practice might be fully understood he had illustrated it by two sheets of drawings. He then gave a detailed description of his invention, a summary of which will be found in the judgment of Lord Justice *Cotton*, and concluded as follows:—

"Having now particularly described and ascertained the nature of my said invention, and in what manner the same is to be and can be performed, I hereby declare that I do not limit myself to the precise details of my invention as hereinbefore specified and as illustrated by the accompanying drawings, because equivalent modifications or variations can be made in such details and quite consistent with the principles or characteristic features of my invention, and in conclusion I declare that what I claim is:—The general construction, adaptation, or application, and the combination and use of the several parts, in the whole constituting improved more simple and efficient appliances or means for working or operating on iron or steel forgings substantially as hereinbefore set forth and as illustrated on the accompanying drawings."

The Defendants disputed the validity of the Plaintiff's patent on various grounds. One of the particulars of objection was that the provisional specification of the alleged invention did not describe the nature thereof, and that the invention claimed in the complete specification was an invention different from and larger than that described in the provisional specification. Another objection was that the complete specification did not end with a distinct statement of the invention claimed.

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The action came on for hearing before Mr. Justice *Kekewich* on the 24th of November, 1887.

Sir *R. E. Webster*, A.G., *Aston*, Q.C., and *W. N. Lawson*, for the Plaintiff.

Sir *H. James*, Q.C., *Moulton*, Q.C., and *W. R. Bousfield*, for the Defendants:—

The patent is invalid, as the Plaintiff has failed to comply with the rules, and his specifications are defective. There are many objections. The provisional specification fails to describe the invention, and the complete specification is defective without the help of the provisional: *United Telephone Company* v. *Harrison* (1). Moreover, portions of the invention are not new and other portions are not useful, and in parts it is not patentable. The words used in *Bailey* v. *Roberton* (2) occur nowhere else. The Plaintiff was in the employment of the Defendants when he took out his patent and the invention has always been used by them.

1887. Dec. 21. KEKEWICH, J.:—

The questions of fact were disposed of at the trial, and I have now to give judgment on the questions of law arising in this case. I will state them in what may be styled historical order, which, however, is not the order in which they were argued on either side, or the order in which I shall find it convenient to treat them. They are these:—

1. Was the Plaintiff the first and true inventor of the method of turning ingots for which letters patent have been granted to him?

2. Did he in his provisional specification adequately describe the nature of his invention pursuant to the statutory requirements?

3. Did he by his complete specification and the accompanying drawings particularly describe and ascertain the nature of the invention and in what manner it is to be performed pursuant to the statutory requirements?

4. Does the complete specification end with a distinct statement of the invention claimed pursuant to the like requirements?

(1) 21 Ch. D. 720, 744. (2) 3 App. Cas. 1055.

5. Has the invention the note of utility?

6. Have the Plaintiff's privileges conferred by the letters patent been infringed by the Defendants? and

7. Is the Plaintiff debarred by any express or implied agreement or by his conduct towards the Defendants from suing them for such infringement?

[His Lordship then decided (1) that the Plaintiff was the first and true inventor; (5) that his invention had the note of utility, as the employment of many hands, and consequently the payment of large wages was avoided, though part of the invention called the "gas tongs" arrangement had not been put in practice. His Lordship then proceeded:—] I have thus far treated the case as if the Plaintiff's specification were easy reading, or, at least, as if no questions of construction or legal effect arose thereon, and I have therefore treated the Plaintiff's processes as well known (as of course they were to all engaged in the case) instead of referring to his language or to the extent of the claim except in general terms. But, in truth, serious questions arise on the specification, and with these I must now deal. It is said that there is a fatal objection to the provisional specification on the ground that it does not sufficiently describe the nature of the invention as regards one particular process, namely, that which the Defendants have described and claim to be entitled to use, and further, that the complete specification does not end with a sufficient claim, as is required by the statute of 1883. I will deal with the latter question first.

The claim is not happily framed. It is conceived in language wisely intended to be comprehensive, but certainly wanting in precision. It moreover employs many words where a few would have sufficed and been more clear. This, however, in my judgment is not sufficient to make it a bad claim. The statute requires that the complete specification shall "end with a distinct statement of the invention claimed." It does not mean that you are to find at the end of the specification a claim which read and construed alone will enable you to say how the several details which enter into nearly all, if not all inventions, are to be put together, or what several modifications are possible or preferable, or how any of them is to be performed. It is to be read and

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construed with the explanations in letter-press which precede it, and with the figures, if figures there be, which illustrate and assist those explanations. Its office is to sum up what has been explained in detail, and to state distinctly, that is, in a manner fairly intelligible to the competent student, what is claimed and, if necessary for distinctness, what is not claimed, so as if, as is likely and usual, the copiousness of explanation and illustration has proved embarrassing no reasonable doubt may remain as to what is of the essence of the invention and what is left at large for the ingenuity of subsequent workers in the same field. Notwithstanding the criticisms, the short effect of which I have already stated, my own conclusion is, and the evidence bearing on the point supports it, that the Plaintiff's specification fulfils these conditions. It says in sufficiently clear language that the patentee claims no one of the parts which are mentioned, but that he does claim the combination of those parts in the whole also mentioned and for the purposes which have been previously described. It is vague, I think, but not uncertain. The vagueness is in form not in substance.

Turning back to the question arising on the provisional specification, I must, before considering how the law stands on the authorities and applying it to this particular case, state what, to my mind, the real question is. There is nothing more important to the proper consideration of a point of law than to state that point in a correct as well as precise form. The elaborate, skilful, and powerful arguments for the Defendants have assumed the question to be (as I above stated it) whether there is a fatal objection to the provisional specification on the ground that it does not sufficiently describe the nature of the invention as regards one of the processes described and claimed in the complete specification. This I think is misleading and wrong. If it were right I should be bound to construe the provisional specification according to the ordinary rules of construction without reference to any other document. I should of course be entitled to information of the common knowledge respecting the manufacture mentioned, the instruments employed in it, and their use, and further, I should be entitled to the evidence of experts to

explain terms of art, and to tell me how they would necessarily or properly be used by an intending patentee. But with that assistance I should be obliged to be content, and possibly, nay probably, I should fail to ascertain the full meaning of the document, or, as regards some part of it, be unable to give it any intelligent meaning at all. The real meaning might all the while be at my feet, be within easy reach by only turning over a page, and yet I might be compelled to tell the patentee of a useful and valuable invention that he was out of Court because in his natural and proper eagerness to secure the fruits of his industry he had unfortunately employed language unintelligible only by reason of the want of fullness, which though capable of explanation must not be explained. I do not think that this is the intention of the legislative provisions found alike in the Act of 1852 and the Act of 1883, that the provisional specification must "describe the nature of the invention," as must also, be it observed, the complete specification, which is also to contain other important particulars indicating its more complete character. The real question is, not whether the provisional specification is defective, but whether the complete specification is excessive. I do not mean that a provisional specification may not, standing alone, fail to fulfil the statutory requirements and be objected to on that ground, but that where, as here, it is said that one of the three processes claimed by the complete specification is not to be found in the provisional, you must first read and construe the complete specification, and having done that you must turn to the provisional specification, and with the aid of the knowledge of what has been claimed by the latter decide whether on a fair interpretation each essential part of that claim is covered by the former.

This mode of stating the question is consonant to the decided questions. Lord Justice *Fry*, in *United Telephone Company* v. *Harrison* (1), deals with the point in that manner on page 742. He states the discovery as described in the complete specification, and then, after examining the authorities, he turns, on page 745, to the provisional specification to see whether it covers the disputed ground. The judgment of Chief Baron *Pollock* in *Newall*

(1) 21 Ch. D. 720.

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v. *Elliot* (1), and Vice-Chancellor *Wood* in *Curtis* v. *Platt* (2) follow the same lines. It may be suggested that those of Lord *Cairns* and Lord *Blackburn* in *Bailey* v. *Roberton* (3) do not; but although in their addresses to the House of Lords they refer to the provisional specification before the complete specification, I think that logically they must be understood to have treated them in reverse order. The form of judgment is consistent with this, and so is the reference by Lord *Blackburn* at page 1073 to the nonconformity of the complete specification with the provisional specification. It must be remembered that Judges express their opinions at the conclusion of a case, that is, after hearing the evidence and arguments on either side, and it by no means follows that, because they put one fact or point of law first, therefore it occurred first to their minds.

Except as regards the claim with which it ends (about which I have said what occurs to me), there is no question on the complete specification before me. It describes the nature of the invention in three processes, each of which is depicted on the figures referred to, and I have it proved that a competent workman, with this document before him, would have no difficulty in producing the instruments mentioned. One of these is an instrument combined of wheel, endless chain, lever, and ratchet, to be worked by hand or other convenient machinery, to be substituted for manual labour, such as a crane-wheel. Knowing this, I have to ask myself whether the particular process is so indicated in the provisional specification that I may hold the nature of the invention to be there described. Before examining the language, I must inquire by what rules I am to be guided in that examination. Here, happily, I find full and precise directions in the decisions of several Judges, differing in form of expression, but not at all in essential character.

These are some of the decided cases, but the list is by no means exhaustive: *In re Newall and Elliot* (4); *Newall* v. *Elliot*, in the Court of Exchequer (5); *Bailey* v. *Roberton*, in the House of Lords; and *United Telephone Company* v. *Harrison*, before Lord Justice *Fry* (6). The judgment of Chief Baron *Pollock*

(1) 10 Jur. (N.S.) 954.
(2) 3 Ch. D. 135, n.
(3) 3 App. Cas. 1055.
(4) 4 C. B. (N.S.) 269.
(5) 10 Jur. (N.S.) 954, 955.
(6) 21 Ch. D. 720.

in *Newall* v. *Elliot* (1) is instructive. He says that the object of the statute, in requiring a provisional specification, is to call on the patentee when he applies for the patent "to give some notion what his invention is," and that the object of the provisional as well as of the complete specification is "to ascertain the identity of the invention, and to make it certain that the patentee shall ultimately obtain his patent for that invention which he presented to the Attorney-General in the first instance." This entirely accords with the judgment in the Court of Common Pleas between the same parties, which says (2): "But the office of the provisional specification is only to describe generally and fairly the *nature* of the invention, and not to enter into all the minute details as to the manner in which the invention is to be carried out; otherwise the provisional specification must be as full as the complete specification, and drawn with as much care and deliberation." I will not quote the language of Lord *Blackburn* in *Bailey* v. *Roberton* (3), who carefully explains the office of the provisional specification, and the obligation laid upon the patentee by the statute which requires it. He amplifies and expounds, but does not in the slightest degree vary, the rules laid down in the other cases. Lord Justice *Fry* professed to follow, and did follow, *Bailey* v. *Roberton*. The language of Lord *Blackburn*, in that case, he quotes at length. He also quotes a pithy saying of Sir *George Jessel*, engrafted into his own judgment, an extract from which I must myself quote because it so exactly and yet concisely expresses the law on the point. On page 747 he says: "I agree that the provisional specification need not describe the manner in which an invention is to be carried into effect. I agree that it need not describe the nature of the invention otherwise than roughly; but it ought to do so fairly and honestly."

I must apply this rule to the case in hand. Mr. *Siddell's* provisional specification is certainly rough enough. It would have been difficult to frame one more certain to provoke criticism. Knowing, however, from the complete specification, of what he intended to give a notion, I can manage, not without difficulty,

(1) 10 Jur. (N.S.) 955. (2) 4 C. B. (N.S.) 293.
(3) 3 App. Cas. 1055.

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but yet I think fairly and honestly, to establish the required identity.

[His Lordship then stated the parts of the specification which in his opinion established the identity, and referred to the evidence on that point. The sixth question, as to infringement, was little more than formal. As to the seventh question, which his Lordship said was started by himself, he decided that there was nothing which would justify the Court in holding that the Plaintiff had waived, as against the Defendants, the right to insist on any of his patent privileges, and still less that he had granted an irrevocable license to the Defendants.]

The result is that I have decided in the Plaintiff's favour all the points except that concerning the use by the Defendants of what is called the automatic action. I am reluctant as against infringers, and especially as against such infringers, to make the generally successful plaintiff pay any costs, and I do not think that the issue is sufficiently distinct to compel me to do so. As, however, some evidence was devoted to it, I shall relieve the Defendants from that part of the costs.

The Plaintiff is entitled to judgment for an injunction with costs on the higher scale, except as above mentioned.

C. M.

C. A

The Defendants appealed, and the appeal was argued on May 1, 3, 4, 5, 7, 1888.

Sir *H. James*, Q.C., *Moulton*, Q.C., and *W. R. Bousfield*, for the Appellants:—

The nature of the invention, as indicated by the provisional specification, was the turning over of forgings by means of ratchet clips or grips, fixed to the ingot, and working from a horizontal bar that was fixed to the crosshead. Then the arrangement which is chiefly dealt with by the complete specification is one which has no horizontal bar fixed to the crosshead. The complete specification therefore goes beyond the provisional specification, and includes what is not comprised in it. The patent is therefore bad. Then the provision of sect. 5, sub-sect. 5, is not complied with, for the complete specification does not end with

a distinct statement of the invention claimed. There is a claim at the end, but it is so vague that it throws no light upon what the inventor claims.

Sir *R. E. Webster*, A.G., *Aston*, Q.C., and *W. N. Lawson*, for the Plaintiff:—

This complete specification merely developed the general statements of the provisional specification. An inventor must not put into his complete specification a new invention which he had not in his mind when filing his provisional specification; but if the provisional specification contains a general description of the invention patented the law is satisfied, no matter how inaccurate or obscure that description may be. The Act of 1883 did not create provisional specifications, nor was it intended to alter the law as to them; it is substantially the same as the Act of 1853. The law on the subject is defined by *Bailey* v. *Roberton* (1); *Woodward* v. *Sansum* (2). Then as to the vagueness of the claim, we say that the patentee has shewn what his invention is. What he says is in substance this: "I have pointed out three things. I have found out the combination of an endless chain wheel and ratchet. I have found out the gas tongs which can be put as a clip, grip or ratchet on the forging. I can use the endless chain, actuated by the weight of the forging, or I can use it working independently by means of pulling down the lever. I can use that together with a clip or grip on the forging, or I can use them independently."

Sir *H. James*, in reply.

1888. May 18. COTTON, L.J.:—

This is an appeal by the Defendants against the judgment of Mr. Justice *Kekewich* restraining them from an alleged infringement of the Plaintiff's patent. Several objections have been taken to the validity of the patent, and before considering them I think it best to construe the specification, and see what it is that the Plaintiff claims to protect as his invention. After carefully considering it, I think that he claims various separate

(1) 3 App. Cas. 1055. (2) 4 Rep. Pat. Cas. 166, 174.

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combinations, and also a combination of them all. Now, first of all, with reference to fig. 1, sheet 1, with which he begins, he claims a combination of a wheel and an endless chain, the wheel having cogs inside which are operated upon by a lever with a ratchet, so as to turn the wheel, this apparatus being suspended from an overhead railway. The ratchet may be acted upon either by the lever being operated upon by external force, or by the end of the lever when the chain slacks coming into the slack of the chain, in which case when the wheel and chain are drawn up, so that the chain supports the weight of the ingot, the chain is straightened, and operates upon the ratchet automatically. Then, after thus dealing with the wheel and ratchet as supported independently from an overhead railway, he deals with them as supported by a crank bar fitted to the cross-head of the steam hammer or hydraulic press. Then he also claims what has been called the gas tongs arrangement; that is to say, he suspends from a horizontal bar, passed through the cross-head of the hammer or press, hooks which act on a lever rigidly connected with what he calls a clip or ratchet grip, which grasps the ingot to be forged. When the horizontal bar is let down by the descent of the hammer or press the clip slips over the ingot, and when the hammer or press is raised the clip is pulled up, grasps the ingot again, and pulls it round. I think it evident from his description that he claims the endless chain wheel and ratchet as combined with what I will call the gas tongs arrangement, when all of them are used together with the press or the hammer. He also, I think, claims the combination of the wheel ratchet and endless chain separately, that is to say as suspended by the overhead railway, and he also claims the other portions of what he has described, if they are used separately. That, I think, appears from this passage of the specification: "The appliance as shewn at figs. 1 and 2, on sheet 1 can also be used in combination; in fact, each arrangement of appliance can be used either separately or combined for the purposes of lifting, slinging, or turning over the ingot or forging when in the furnace, under the press or hammer, or when being otherwise operated on." He does not claim the wheel and endless chain by themselves, because that is a very old combination,

but he does claim, in my opinion, the wheel and endless chain when the wheel is furnished with internal cogs and operated upon by the ratchet, either automatically or by the application of external force to the end of the lever. Those, in my opinion, are the inventions he claims, the whole combination, or the separate parts which I have mentioned when used as separate combinations.

Having expressed my opinion as to what the invention claimed is, I will now go to the objection that the patent is bad because the invention claimed in the complete specification goes beyond the invention the nature of which is explained in the provisional specification. The provisional specification is provided for under sect. 5, sub-sect. 3, and all that is required by that sub-section is that the provisional specification must describe the nature of the invention and be accompanied by drawings if required. Now, I think that this provisional specification does sufficiently describe the nature of the invention, and before I go into it I will refer to what I said in the case of *Woodward* v. *Sansum* (1), to which I adhere. An objection was taken there on the ground of nonconformity of the complete to the provisional specification, and I said (2): "I think that although there is a different mode of carrying out the improvement contemplated by the plaintiff in his second patent, and described in sheet 3, from that which is practically described in the provisional specification, the whole of it comes within the invention the nature of which he has described in his provisional specification. It is true that in his provisional specification he has stated a different mode of carrying his invention into effect, from that which he stated in sheet 3 of his complete specification; but if both are really within the same invention, described though not minutely but in general terms in the provisional specification, then the patent will not be bad, simply because a different mode of carrying the same invention into operation is described in the complete specification, and even although that may be an improvement on what is described in his provisional specification; because a patentee putting in a provisional specification shewing the nature of his invention is not bound to describe the way in which that can be carried

(1) 4 Rep. Pat. Cas. 166. (2) 4 Rep. Pat. Cas. 174.

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into effect and operation, but if he does describe a way of doing it, and before he files his complete specification, he either finds out improvements in that way or a different way of carrying into effect that which is described as his invention in the provisional specification, he is bound to give the public the benefit of what he has discovered as regards the mode of carrying the invention, the nature of which must be described in the provisional specification, into effect, even although there may be improvement and even invention which was not known to him at the time." [His Lordship then compared the specifications and stated his conclusion to be that the invention described in the complete specification did not go beyond that indicated in the provisional specification.] As that is my view I do not enter into the question what would be the effect of the complete specification going beyond the nature of the invention indicated in the provisional specification. Whether such nonconformity would vitiate the patent is a question on which it is not necessary in the present case to give any opinion, and I think it better not to give any, that I may be free to deal with it if it should hereafter call for decision.

Having cleared away that first objection I go to that on the form of the complete specification. Sub-sect. 5 of sect. 5 of the Act of 1883 says: "A specification, whether provisional or complete, must commence with the title, and in the case of a complete specification must end with a distinct statement of the invention claimed." It is said here that the complete specification does not end with a distinct statement of what the Plaintiff claims. There are two questions, of course, to be considered with reference to this objection. Is there a distinct statement within the meaning of the 5th section? If there is not, what is the effect of the deficiency upon the patent? The statement is this: "I declare that what I claim is the general construction, adaptation or application, and the combination and use of the several parts in the whole, constituting improved more simple and efficient appliances or means for working or operating on iron or steel forgings substantially as hereinbefore set forth and as illustrated on the accompanying drawings." Now if it were necessary to decide the question I should not hold that the

requisitions of sect. 5 had not been complied with. Sub-sect. 5 of sect. 5 requires that a complete specification shall end with a distinct statement of the invention claimed. Before this Act, there was no necessity in any case for a claim. A claim was very useful in order to prevent it being contended that the specification described the invention in such a way as to claim that which was old. Very frequently the object of a claim was rather to disclaim—"I do not claim so and so, but what I do claim is so and so, or I claim the whole combination. I do not claim the particular parts which are old." Or it may be that a man might claim the whole combination, and also he would say that "I claim so and so (a particular part of the combination) as being my invention." Of course, if he did not particularize what he claimed and the description of his invention included something which apparently he claimed and which could be shewn to be old, that would vitiate the patent. It is now for the first time required by the present statute that there shall be a statement of what the patentee claims. I understand "distinct" there to mean independently of and apart from the mere description of the nature of his invention and of the way in which it is to be carried into effect. He must state what he claims and what he does not claim. Here I think that the patentee has done so sufficiently, though roughly and indefinitely, and not in the way in which it ought to be done.

But supposing the statement of the invention claimed not to be such as is required by sect. 5, sub-sect. 5, that in my opinion will not vitiate the patent. When a complete specification is brought before the Comptroller he examines it and he takes advice; he may require the specification to be amended, and there is an appeal to the Attorney-General. There is nothing in the Act which says that if the complete specification does not contain that distinct statement the patent shall be bad, and the requisition is to be found in a section which refers to the application for a patent and contains requisitions the neglect of which can hardly be contended to make the patent bad. It may be that the neglect to comply with some of these requisitions will make the patent bad, not because of any enactment in this section but because, according to law, the specification must so describe the

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invention, that the public may know what the invention is and how it is to be carried into execution. But in my opinion that is provided for by sect. 26, sub-s. 3, which enacts that, "Every ground on which a patent might, at the commencement of this Act, be repealed by *scire facias* shall be available by way of defence to an action of infringement and shall also be a ground of revocation." Now, it may well be that the whole of the complete specification and the statement of claim taken together may be so indefinite that it cannot be discovered either what the invention claimed is or how to carry it into effect, and then under the old law, and not under any express provision of this Act of Parliament, the patent will be bad, because the inventor has not done that which he is bound to do, and that is open under sub-sect. 3 of sect. 26. In my opinion the requisition in sect. 5, sub-sect. 5, must be considered as a mere direction to be attended to by the Comptroller and the law-officer when the matter comes before them, and if they are satisfied, then unless independently of this provision the specification is so indefinite as to make the patent bad, the mere fact that there is not a compliance with this or with other provisions of this section will not of itself make the patent bad. I am of opinion, therefore, that this objection also fails. [His Lordship then proceeded to consider other objections which had been taken to the patent, and gave his reasons for disallowing them.]

FRY, L.J.:—

Lord Justice *Cotton* has very fully discussed the questions which arise in this case. I have had the benefit of conferring with him and discussing these questions with him during the interval between the argument and to-day, and I concur in the conclusion arrived at by the Lord Justice, and with one exception I concur in the reasoning by which he has arrived at that conclusion. The exception to which I refer is with regard to the 5th sub-sect. of sect. 5 of the Act of 1883 which requires that the complete specification shall "end with a distinct statement of the invention claimed." I differ from his opinion that this complete specification satisfies that requirement. It appears to me that the intention of the Legislature is reasonably plain from the

words I have read, but I think that they are illustrated by form C. which is given in the schedule to the Act, and which, having provided for a statement of the invention, concludes in this way: "Having now particularly described and ascertained the nature of my said invention, and in what manner the same is to be performed, I declare that what I claim is (1) . . . . (2) . . . . (3) . . . . &c." and the marginal note is "Here state distinctly the features of novelty claimed." Now, turning to this specification, I find that it concludes thus:— "Having now particularly described and ascertained the nature of my said invention and in what manner the same is to be and can be performed, I hereby declare that I do not limit myself to the precise details of my invention as hereinbefore specified, and as illustrated on the accompanying drawing, because equivalent modifications or variations can be made in such details and quite consistent with the principles or characteristic features of my invention." I pause there to observe that the author of this specification knows the distinction between the principles and characteristic features of his invention and those details which are unessential. Now it occurs to me that those principles and characteristic features are the very things he ought to have explained to us in his claim. He ought to have told us in his claim succinctly and distinctly what were the principles and characteristic features of the invention. But instead of that, he tells the reader that there are such features and that there are such principles, but leaves them to find them out from reading the whole specification. Then the specification proceeds, "And in conclusion I declare that what I claim is the general construction, adaptation, or application, and the combination and use of the several parts, in the whole constituting improved, more simple and efficient appliances or means for working or operating on iron or steel forging substantially as hereinbefore set forth and as illustrated on the accompanying drawings." The effect of that is to throw the reader back by reference to the whole of what has gone before, with the additional difficulty created by a direction to distinguish that which is the substance from that which is not the substance. Now in my view that is not in any proper sense a distinct statement of the inven-

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tion claimed, because, as I have already said, you are thrown back upon the whole of the specification. I cannot, therefore, agree with the Lord Justice in thinking that this specification has satisfied the requirement of the statute:—but I do agree with him in thinking that the want of satisfaction of that requirement is by no means fatal to the validity of the patent. The requirement occurs, as has been already pointed out, in the 5th section of the Act of 1883, a section which, as it appears to me, is throughout directory. In saying this, I do not mean to affirm that there are not directions there given the non-observance of which would be fatal, but I mean that the whole scope and object of the section is to give particular directions with regard to the application for and the granting of the letters patent. This is one of a bundle of enactments which all have to do with the application for and the granting of a patent. Let me take the 1st sub-section of sect. 5: "An application for a patent must be made in the form set forth in the 1st schedule to this Act, or in such other form as may be from time to time prescribed; and must be left at, or sent by post to, the patent office in the prescribed manner." Suppose there were a variation in form in the application actually made from that set forth in the schedule or prescribed by the general rules, and the objection was waived by the Comptroller and the law officers and the patent duly granted, it would in my opinion be monstrous to hold that the variance from the form would be fatal to the letters patent. So again, suppose instead of the application being left at or sent by post to the Patent Office, it had been sent to the private house of the Comptroller, and the business had been transacted there, and it had never reached the Patent Office, and the patent had been properly granted, it would in my judgment be monstrous to say that that fact avoided the letters patent. I think, therefore, that although there are contained in the 5th section certain requirements, the non-observance of which would be fatal, that result follows, not from the 5th section, which is purely directory, but either from the nature of the requirements or from the other provisions of the statute. That may be illustrated very well by the 4th sub-section, "A complete specification, whether left on application or

subsequently, must particularly describe and ascertain the nature of the invention, and in what manner it is to be performed, and must be accompanied by drawings, if required." If the specification does not comply with that, then under the 26th section of the same statute it would be open to apply for the revocation of the letters patent, or it would be a ground of defence to an action for infringement. I come, therefore, to the conclusion that although in my opinion this complete specification did not conclude with a distinct statement such as is required by the Act, that defect is not made a ground for revocation under the 26th section of the Act, and is not fatal to the validity of the patent. In all other respects I do not desire to add anything, but concur in the judgment of the Lord Justice.

LOPES, L.J.:—

There are two matters only to which I wish shortly to refer. With regard to the objection of nonconformity between the provisional and the complete specification, this matter was very carefully considered in *Woodward* v. *Sansum* (1), and having referred to the decision in that case I think that the objection fails.

With regard to the objection that the complete specification does not end with a distinct statement of the invention claimed, I agree with Lord Justice *Fry*. I think that a distinct statement must mean something more than a separate paragraph. I think the Legislature meant a concise statement of the main features of the invention, something to which the reader might readily refer and learn therefrom, without referring to the body of the specification, what the characteristic features of the invention claimed were. Applying this to the present case, the statement of claim here seems to me to be too loose, rendering it necessary for the reader, in order to ascertain the characteristic features of the invention, to refer to the body of the specification. But if it is not a distinct statement of claim, then the question arises how far does that affect the patent. I entirely agree with the rest of the Court that the statute in this respect is only directory, and that the non-compliance with this direction does not invalidate the patent. In all other respects I entirely agree

(1) 4 Rep. Pat. Cas. 166.

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with the judgment of my learned brethren, and think that this appeal fails.

Solicitors for Plaintiff: *J. H. & J. Y. Johnson.*

Solicitors for Defendants: *Cattarns, Jehu, & Hughes,* agents for *Younge, Wilson & Co., Sheffield.*

H. C. J.

C. A. 1888 *June* 8.

In re BEYFUS AND MASTERS'S CONTRACT.

[1888 B. 430.]

Vendor and Purchaser — Misdescription — Conditions of Sale — Underlease described as Lease — Condition that Misdescription shall not annul the Sale.

Houses offered for sale were stated in the particulars to be held for ninety years from the 24th of June, 1844, at a ground rent of £21. The 4th condition provided that the title should commence "with the lease under which the vendor holds dated 11 July, 1845." The 5th condition stated that "the description of the property in the particulars is believed to be correct, but if any error shall be found therein the same shall not annul the sale, nor shall any compensation be allowed in respect thereof." The vendor was in fact entitled to an underlease for the residue of the term of ninety years less two days at a peppercorn rent, and the owner of the two days could not be found:—

Held, by the Court of Appeal, that the representation that the property was held by lease when it was in fact held by underlease was a fatal misdescription, unless it was cured by the 5th condition, and that the 5th condition did not apply, for that "error in the description of the property" meant a misdescription of the corporeal property, not a mistake in the description of the vendor's title:

Held, therefore (affirming the decision of *Kay*, J.), that a good title was not shewn.

Dictum of *Jessel*, M.R., in *Camberwell and South London Building Society* v. *Holloway* (1) disapproved.

BY a lease of the 11th of July, 1845, thirty-two messuages were demised to *W. Dennis*, a builder, for ninety years, from the 24th of June, 1844, at the yearly rent of £3 10*s.* each, the covenants and conditions being made to apply separately to the several houses, so that they were in effect held under separate leases.

Dennis on the 13th of February, 1846, mortgaged all the houses, and shortly afterwards, with the concurrence of the mort-

(1) 13 Ch. D. 760.

gagee, sold and assigned six of them to *Simpson*, who, by indenture of the 16th of December, 1846, mortgaged them to *Swaine* by demise reserving the last two days of the term. In January, 1849, the mortgagee, in exercise of a power of sale, and without the concurrence of the mortgagor, assigned these six messuages to a purchaser for the residue of the original term less the two days. In October, 1870, the person claiming under the will of the purchaser sold and assigned to *Thorne* for the residue of the term of ninety years less two days. *Thorne* died in 1886, leaving a will of which *Masters* was the executor and trustee.

In 1887 *Masters* put up the six houses for sale in one lot, describing them in the particulars as "held for ninety years from the 24th of June, 1844 (forty-seven years being unexpired at Midsummer, 1887), at the moderate ground rent of £3 10*s.* per annum each house, or together £21 per annum."

Among the conditions of sale were the following:—

"4. The vendor will within seven days from the day of sale deliver to the purchaser or his solicitor an abstract of title to the property, such abstract to commence with the lease under which the vendor holds, dated the 11th day of July, 1845, a copy or abstract whereof will be produced at the time of sale, and may be inspected two days before that date at the offices of Messrs. *Cowland & Chowne* as aforesaid, and the purchasers shall be deemed to purchase with full knowledge of the covenants and provisions contained therein. The original lease, and a mortgage by the original lessee dated the 13th of February, 1846, are not in the vendor's possession, and the purchaser shall not require production of the same or either of them, but shall be satisfied with the production of an attested copy thereof, which will be handed over with the title deeds on completion of the purchase.

"5. The property is sold subject to existing tenancies and to all rights of way and other easements (if any) affecting the same, and the identity of the property offered for sale with that contained in the muniments of title shall be admitted. The description of the property in the particulars is believed to be correct, but if any error shall be found therein the same shall not annul the sale, nor shall any compensation be allowed the vendor or purchaser in respect thereof.

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"6. The purchaser shall bear the expense of stamping all unstamped or improperly stamped documents (if any) and registering all unregistered documents (if any), and if necessary of getting in any outstanding estate."

The purchaser required the outstanding two days to be got in. It was found, however, that this was practically impossible as the necessary parties could not be found. The purchaser therefore took out a summons to have it declared that a good title had not been shewn on the ground of the vendor's not having complied with the requisition to get in the two days, and on the ground that the particulars were incorrect in stating that the premises were held for ninety years from the 24th of June, 1844.

Mr. Justice *Kay* in Chambers made an order that the vendor should within two months procure at his own expense an assignment of the original term, and that unless he did so within that period the contract should be rescinded, and that the vendor should pay the purchaser his costs of investigating the title, return the deposit with interest, and pay the costs of the application.

The vendor appealed.

Whitehorne, Q.C., and *Morshead* for the Appellant:—

We cannot deny that there is a misdescription, but we contend that it is not in itself a fatal one, and that if it were it is covered by the 5th and 8th conditions. *Madeley* v. *Booth* (1) is against us, but the reasons given for the judgment are unsound, as appears from *Doe* v. *Byron* (2); it has been disapproved of by *Jessel*, M.R., in *Camberwell and South London Building Society* v. *Holloway* (3), and cannot now be regarded as law.

[BOWEN, L.J.:—The observation of the Master of the Rolls was not necessary to his decision.]

The misdescription is not of such a character as to warrant setting aside the contract: *Bartlett* v. *Salmon* (4). Parties can contract as they please, and, if they choose to agree that a misdescription shall not avoid the contract, effect will be given to the stipulation, unless the misdescription is of so gross a character

(1) 2 De G. & Sm. 718.
(2) 1 C. B. 623.
(3) 13 Ch. D. 754, 760.
(4) 6 D. M. & G. 33.

that the purchaser would get something quite different from what he contracted to buy.

[FRY, L.J.:—In *Bartlett* v. *Salmon* (1) the bill to rescind was dismissed without costs, though it alleged fraud, and the Lord Chancellor held that none was proved. Does not that shew that specific performance would not have been decreed?]

Our case is like *Bartlett* v. *Salmon*, the summons is by the purchaser to rescind.

[FRY, L.J.:—Does not "error in the description of the property" mean misdescription of the material thing, the houses?]

"The property" ought to be held to denote that which is offered for sale, *i.e.* the vendor's interest in the houses, not the houses themselves. The purchaser will be no worse off with the underlease than with the original lease—in fact better, for he will not be bound by the covenants in the original lease.

[FRY, L.J.:—The purchaser cannot surrender to the freeholder and get a new lease. Have you any case where the Court has compelled the person who bought a lease to take an assignment of an underlease?]

We do not know of any.

[COTTON, L.J.:—The language of condition 4 is against holding that a misdescription of this kind can be intended to be covered by condition 5.

FRY, L.J.:—In *Henderson* v. *Hudson* (2) it was laid down that describing an underlease as a lease was a fatal misdescription.]

In *White* v. *Cuddon* (3), a misdescription similar to this was held not to entitle the purchaser to compensation.

Everitt, Q.C., and *E. Ford*, for the purchaser, were not called on.

COTTON, L.J.:—

It is conceded that the particulars and conditions of sale represent that the vendor had a lease of the property though he

(1) 6 D. M. & G. 33. (2) 15 W. R. 860.
(3) 8 Cl. & F. 766.

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had in fact only an underlease. It is admitted, therefore, that the description was not correct. Mr. *Whitehorne*, however, contended that the misdescription, if otherwise fatal, was cured by the conditions of sale. The order under appeal goes on to direct rescission of the contract, and it may be a question whether it was right in going so far, but the Appellant took no objection on that ground, and the only question we are asked to decide is whether a good title according to the conditions has been shewn. It is argued that the vendor is protected by the 5th condition, which says, "The description of the property in the particulars is believed to be correct, but if any error shall be found therein the same shall not annul the sale, nor shall any compensation be allowed the vendor or purchaser in respect thereof." In my opinion, "property" there means the physical thing which was sold, viz., the houses. In condition 4 the vendor says he will "deliver to the purchaser or his solicitor an abstract of title to the property, such abstract to commence with the lease under which the vendor holds dated the 11th day of July, 1845." The vendor does not hold under this lease, but under an underlease. I cannot conceive that condition 5 applies to a misdescription of this kind. It applies to a misdescription of the physical property, not to a mistake in the description of the title to it. The defect, then, is not cured by the condition. There is abundant authority in support of the proposition that describing what is sold as a lease when it is in fact an underlease is a material misdescription. The appeal therefore fails.

BOWEN, L.J.:—

I think that the meaning of the words "description of the property" in condition 5 is best got at by taking the usual meaning of that expression, and looking at the other conditions of sale. Condition 4 provides that the vendor is to deliver an abstract of title, which is to commence with the lease under which the vendor holds, which is afterwards referred to in the same condition as "the original lease," and the condition states that the rents were apportioned by the lease. This shews that "description of property" in the particulars does not include statements as to the lease itself. The condition goes on to provide that no compensa-

tion shall be given for misdescription, which throws light on the meaning. An intending purchaser could satisfy himself by inspection whether the physical property had been described with sufficient accuracy, and we ought not to extend a condition of this kind to misdescription which he could not discover till he received the abstract of title. I think, therefore, that the difference between the thing sold and the description of it in the particulars is fatal.

Great stress was laid on a dictum of the late Master of the Rolls in *Camberwell and South London Building Society* v. *Holloway* (1), dissenting from *Madeley* v. *Booth* (2). It must, however, be observed that the remark of the Master of the Rolls was not material to his decision, for in that case the purchaser had notice at the auction of the true nature of the interest which he was going to buy. This remark, therefore, though made by a great Judge, cannot in my opinion displace the decision in *Madeley* v. *Booth*. In *Hayford* v. *Criddle* (3), Lord *Romilly* says, "a contract to assign a lease is not satisfied by granting or assigning an underlease," and he gives as the reason that an underlessee is exposed to the risk of forfeiture through acts done by his immediate lessor.

FRY, L.J.:—

I am of the same opinion. It is contended that the 5th condition cures the error of description, but I take the same view of that condition as my learned Brethren, first, because it appears to me to give the most natural meaning to the words "description of the property;" and secondly, because we ought not to give an enlarged meaning to words which restrict the rights of a purchaser in relation to a description which he has no opportunity of verifying. The vendor professed to give him information, and told him that he held under a lease of the 11th of July, 1845, a copy of which could be inspected. I do not think that the condition can be held to apply to such a misstatement as this.

It was urged that an underlease is the same thing as a lease, or better. In some respects it may be better, but it is not the same,

(1) 13 Ch. D. 754, 760. (2) 2 De G. & Sm. 718.
(3) 22 Beav. 477, 480.

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and in some respects it is worse. The outstanding two days would make it impossible for the tenant to surrender the lease to the freeholder and take a new lease.

Solicitors for vendor: *Cowlard & Chowne.*
Solicitors for purchaser: *Beyfus & Beyfus.*

H. C. J.

C. A. 1887 KAY, J. *Dec.* 7, 14. 1888 C. A. *June* 7, 8, 9.

In re MOORE. TRAFFORD *v.* MACONOCHIE.

[1887 M. 4279.]

Will—Legacy—Husband and Wife—Gift while living apart—Condition—Limitation.

A testator directed his trustee to pay to his sister *M.* "during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of £2 10*s.* per week for her maintenance whilst so living apart from her husband." *M.* and her husband were married some years before the date of the will, and never lived apart till some time after the death of the testator. The testator's son was living and an infant:—

Held, that the bequest to *M.* was not to be construed as a gift to her during the joint lives of herself and her husband until the son attained twenty-one, upon a condition, which might have been rejected as against the policy of the law, that she and her husband should not live together, but as a limited gift of weekly payments to be made during a period the commencement and duration of which were fixed in a way which the law does not allow, and that the gift was void.

Decision of *Kay*, J., affirmed.

Brown v. *Peck* (1) and *Wren* v. *Bradley* (2) considered.

The distinction between gifts on condition and gifts by way of limitation, discussed.

Followed. *In re* ELLIOTT, DECD. [1952] 1 Ch. 217

JOHN MOORE, who died on the 17th of April, 1885, by his will dated the 2nd of April, 1885, after appointing one *Trafford* his trustee, and appointing a guardian of his infant son, *John William Moore*, proceeded as follows: "I give and bequeath to my trustee all property of which I am possessed or entitled to, or over which I have any disposing power, upon trust (after payment thereout of my debts, funeral and testamentary expenses) to pay to my sister *Mary Maconochie* during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of £2 10*s.* per week for her mainten-

(1) 1 Eden. 140. (2) 2 De G. & Sm. 49.

ance whilst so living apart from her husband: and upon trust as to one moiety of my said trust estate to pay the same to my said son on his attaining the age of twenty-one years; and as to the other moiety thereof upon trust to pay the same to my said son on his attaining the age of twenty-five years," with a gift over on the death of his said son under the age of twenty-five years.

Mary Maconochie and her husband were married in 1866, and they had never lived apart until the latter part of 1886, more than a year after the death of the testator, when they ceased to live together. The testator was well aware, at the date of his will, that they were living together, but he had quarrelled with the husband and had not been for several years on speaking terms with him.

The testator's son survived him and was still an infant.

This was an originating summons taken out by the trustee of the will against Mrs. *Maconochie* for the decision of the question whether she was entitled to payment of the legacy of £2 10*s.* per week, discharged from the restriction imposed by the testator.

Upon the summons coming on in Chambers, his Lordship directed it to be adjourned into Court for argument; that a guardian *ad litem* should be appointed to the testator's infant son, and that the infant should be separately represented.

The summons was heard before Mr. Justice *Kay* on the 7th of December, 1887.

G. Williamson, for the Plaintiff.

Marten, Q.C., and *Whitehouse,* for the Defendant, Mrs. *Maconochie*:—

The provision for payment of the weekly sums while Mrs. *Maconochie* is living apart from her husband, is a provision by way of condition which is clearly illegal and void as against public policy. The rule is that, where there is a gift with a condition annexed which is illegal, the Court will strike out the illegal condition, and leave the rest of the gift: *Brown* v. *Peck* (1); *Wren* v. *Bradley* (2); *Bean* v. *Griffiths* (3); *Cartwright* v. *Cartwright* (4); *H.* v. *W.* (5); *Egerton* v. *Earl Brownlow* (6). So that this gift

(1) 1 Eden. 140.
(2) 2 De G. & Sm. 49.
(3) 1 Jur. (N.S.) 1045.
(4) 3 D. M. & G. 982.
(5) 3 K. & J. 382.
(6) 4 H. L. C. 1.

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should be read thus: "to my sister *Mary Maconochie* during such time as she may live before my son attains the age of twenty-one years, the sum of £2 10*s.* per week for her maintenance." Such a condition as that imposed by this will can only be upheld where it cannot influence the conduct of the husband and wife, as where they are living apart already: *Shewell* v. *Dwarris* (1).

[KAY, J., referred to *Webb* v. *Grace* (2).]

Methold, for the testator's infant son:—

[KAY, J.:—The question is whether I am bound by *Brown* v. *Peck* (3).]

This particular question does not appear to have been argued in that case. Moreover it ought not to be regarded as an authority on the present case, for there the Lord Keeper considered that the qualification annexed to the gift was a condition, whereas here it is a limitation. Then in *Wren* v. *Bradley* (4) there were two gifts, one clearly with a condition subsequent, and the other in the shape of a limitation, but Vice-Chancellor *Knight Bruce* did not distinguish between the two. *Cartwright* v. *Cartwright* (5) is really in my favour, for it is clear that if it had been a limitation—as it is here—and not a condition, the decision would have been the other way. There *Brown* v. *Peck* is cited by Lord Justice *Turner* in his judgment as an authority upon a condition only, and not a limitation. *Heath* v. *Lewis* (6) exactly covers this case, and is a distinct authority for reading this as a limitation. The distinction between a condition and a limitation is there clearly pointed out. If this is a good limitation, then the bequest fails to take effect, because the event on which alone the payments are to be made has not happened. If, on the other hand, it is bad, then the whole gift is void: *Cocksedge* v. *Cocksedge* (7).

[He also referred to *Nicol* v. *Nicol* (8) as to the effect of an agreement between husband and wife, prior to a judicial separation, for making a provision for the wife, where cohabitation is subsequently resumed.]

Whitehouse, in reply.

(1) Joh. 172.
(2) 2 Ph. 701.
(3) 1 Eden. 140.
(4) 2 De G. & Sm. 49.
(5) 3 D. M. & G. 982.
(6) Ibid. 954.
(7) 14 Sim. 244; 5 Hare, 397.
(8) 31 Ch. D. 524.

1887. Dec. 14. KAY, J., (after reading the bequest and stating the facts, continued) :—

Before applying rules of law to a provision of this kind it is proper to determine, independently of any such rule, what is the construction of this bequest.

Independently of any rule of law or decided case, the construction of the words which I have read is indisputable. It is a gift of a fixed sum every week during a certain period. To that period there are two limits: it is not to extend in any case beyond the joint lives of the husband and wife and the time when the testator's son attains twenty-one; but the payments are only to be made during such part of that period as *Mary Maconochie* may be living apart from her husband, and for her maintenance while so living apart. As matter of construction it is impossible to hold that any of these payments are given to her while living with her husband. The living apart from her husband is of the essence of the gift in this sense—that it is the measure of the duration of these payments.

It has been argued that it must be treated as a legacy given upon a condition precedent, which, being against the policy of the law, must be rejected, leaving the legacy free from condition. If it be treated as a gift of an indefinite number of weekly payments of £2 10*s.*, there being a condition attached to each that in the week for which it is payable the legatee should be living apart from her husband, if the condition be rejected, it must fail because the number of payments is undefined.

In other words, if it be a gift of so many sums of £2 10*s.* as there should be weeks in which the legatee was living apart from her husband, then, if you strike out the words "living apart, &c.," there are no means of computing how many such payments should be made.

The duration of these payments is a limitation, not a condition; and to give them any longer or other duration than that prescribed by the will cannot be done by treating them like a legacy of a sum of money given subject to a condition which may be discharged. To treat this gift in that manner would be making an entirely new and essentially different bequest.

It may be said, "You do, in effect, make a different bequest

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when you reject a precedent condition and establish the legacy discharged from it." That is so. It is doing great violence to the will. In cases of real estate the Common Law of England will not permit such a construction: and this rule, adopted from the Civil Law, ought not to be extended. By rejecting a precedent condition upon which a simple legacy of a sum of money is bequeathed, the amount of the legacy is not altered. But in this case the argument requires that an annuity given during one period should be altered into an annuity for another and wholly different period.

This is, for the present purpose, the essential difference between a condition and a limitation.

If the gift were during the joint lives of the husband and wife until the son attained twenty-one, with a condition defeating it if the husband and wife lived together, it might be necessary to reject the condition and maintain the gift; but I think it impossible to construe the will in that way.

Suppose it were a legacy of a sum computed by the number of illegal acts committed by the legatee, at £2 10*s.* for each—obviously such a legacy must fail if you reject the mode of computing it.

Then, suppose it to be £2 10*s.* for every week in which the legatee should commit an illegal act—if the limitation be rejected the computation would be equally impossible; and I am not aware of any rule of construction or rule of law which would justify the Court in treating such a gift as a life annuity.

The argument in its most plausible form is that from the nature of the gift there are two limits contemplated, and if you take one away the other only is left, and therefore, in this case, the gift should be read as though it were of £2 10*s.* a week during the joint lives of the husband and wife, until the son attains twenty-one.

But what authority is there for thus removing an essential limit? There is none, unless it can come under the law as to conditions, or, what is in some cases equivalent, conditional limitations defeating an interest previously given. But before this law can be applied it must be determined, as matter of construction, whether the gift is of that nature.

In my opinion, the true construction of this bequest is that it is a limitation of weekly payments during a specified time, and that it is not a legacy subject to a condition either precedent or subsequent. The object of the limitation being obviously to induce the person in whose favour it is made to live apart from her husband, the whole limitation may possibly be void; but if the event has not happened, the trust has not arisen at all.

For this construction it seems to me that there is clear and distinct authority.

In *Webb* v. *Grace* (1), a covenant to pay to a single woman during her life, subject to the proviso after contained, an annuity of £40, provided that if she married the annuity should be reduced to £20, was held to be valid because it was in effect an agreement to pay £40 a year to her during so much of her life as she should remain unmarried, and £20 a year afterwards, and that this was a limitation not a condition.

In *Heath* v. *Lewis* (2) a gift by will to a woman who had never been married, if she should be unmarried at the death of *M.*, of £2 10*s.* a month during her life if she should so long remain unmarried, was read "as a limitation as distinguished from a condition," and therefore the payments ceased on her marriage. This gift might have been construed to be a defeasible life annuity more easily than the provision in the will now before me, and of course the defeasance would have been void.

In *Evans* v. *Rosser* (3) the testator gave real and personal estate to his son-in-law during the term of his life or marriage again, and after his death or marriage, over; and it was held that this was a limitation till marriage and not a gift of a life estate defeasible on marriage.

The same construction was applied in the well-known case of *Rochford* v. *Hackman* (4), where a limitation in form determining a life estate upon alienation, was held to amount to a limitation until alienation and then over—a construction which has been followed in a multitude of cases since that decision.

But it is said that the Court is bound by authority to hold that the legatee in this case is entitled to £2 10*s.* a week, whether

(1) 2 Ph. 701.
(2) 3 D. M. & G. 954.
(3) 2 H. & M. 190.
(4) 9 Hare, 475.

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she lives apart from her husband or not. The authorities cited demand a careful consideration. Undoubtedly our law, in dealing with bequests of personal property, has adopted some doctrines of the Civil Law which seem to me much less satisfactory than the rules of the Common Law which we apply in the case of devises of real estate. *Swinburne* (1) states four sorts of impossible conditions, of which the second are "those which be contrary to law or good manners," instancing a gift of £100 to *A. B.* if he murder such a man or deflower such a woman. Then he says (2), that where a condition is impossible "such condition hindereth not the . . . . legatary, but that he may . . . . recover the legacy, as if such had not been at all expressed." And he further says (3), "When the condition is both impossible and unhonest . . . . the disposition is thereby void: and that in disfavour of the testator, who added such a condition, whereas if the condition had been only impossible or unlawful, the disposition had been good, and that in favour of the testament."

Jarman on Wills (4) states the law, adopted from the Civil Law, to be that where a condition precedent is originally impossible or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute just as if the condition had been subsequent: but that, where it is illegal as involving *malum in se*, the Civil agrees with the Common Law in holding both gift and condition void.

This law is recognised in *Williams* on Executors (5).

In *Tothill's* Reports (6) is the following short note of a case—*Tennant* v. *Braie* (Nov. 8, 6 Jac.): "A devise made to the daughter to pay her a summe of money if she will be divorced from her husband, the gift made good, though the condition void."

The doctrine that conditions precedent as well as conditions subsequent which are against the policy of the law are treated as void in cases of legacies of personal estate, and that the legacy

(1) *Swinburne* on Wills, Part 4, s. 5, Ed. 1611, p. 138; ed. 1590, p. 122.

(2) Part 4, s. 6, ed. 1611, p. 140; Ed. 1590, p. 124.

(3) Part 4, s. 6, Ed. 1611, p. 142; Ed. 1590, p. 127.

(4) 4th Ed., vol. ii. p. 12.

(5) 6th Ed., p. 1174; 8th Ed., pp. 1269, 1270.

(6) Ed. 1671, p. 141; Ed. 1820, p. 78.

"stands pure and simple," is distinctly recognised by Lord *Hardwicke* in *Reynish* v. *Martin* (1): and the rules borrowed from the Civil Law were held by the late Master of the Rolls to apply to a mixed fund of the proceeds of real and personal estate: *Bellairs* v. *Bellairs* (2).

I assume, therefore, that if this is to be treated as a legacy given upon a precedent condition or defeasible by a subsequent condition which is bad as involving that which is *malum prohibitum*, the legacy must take effect, discharged of the condition.

In *Brown* v. *Peck* (3) the testator, noticing in his will that his niece *Rebecca* had married without the consent of her mother, directed that if she lived with her husband his executors should pay her £2 a month and no more; but if she lived from him and with her mother, then they should allow her £5 a month. Lord Keeper *Henley* held that she was entitled to the monthly payment of £5, "and that the condition annexed being both impossible at the time of imposing it, and *contra bonos mores*, the legacy was simple and pure." I have referred to the Registrar's book, and it seems clear that the condition was only impossible in the sense that everything which is prohibited by law is so in the contemplation of law. The husband, wife and mother seem to have been all three living. It is evident that the will was read as a gift of £5 a month to *Rebecca* for life upon condition that she did not live with her husband, or £5 a month for life cut down to £2 if she should live with him. Such a condition was against the policy of the law, and was therefore treated as a nullity. It appears from the Registrar's Book that the point was not argued, the other parties desiring that the legatee should have the £5 a month.

In *Wren* v. *Bradley* (4) one bequest was to pay to the testator's daughter, in case she should be living apart from her husband *A.*, and should continue so to do during the lifetime of the testator's wife, an annuity of £30; but, if she should cohabit with him, it should cease during such cohabitation. The husband and wife were living apart at the date of the will, but were living together at the death of the testator, and the Vice-Chancellor, evidently

(1) 3 Atk. 330, 332.
(2) Law Rep. 18 Eq. 510.
(3) 1 Eden. 140.
(4) 2 De G. & Sm. 49.

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with considerable hesitation, held that she was entitled to the gift discharged from the condition. He came to the same conclusion with respect to a direction to pay the interest of one-third of the residue to his said daughter "during such time as she shall continue to live apart from her said husband," but if she cohabited with him the income was to be paid to other persons, and after her death the capital was given over. This latter gift is in the form of a limitation rather than a condition.

I must follow these decisions in any case governed by them: but the construction of one set of words is not binding when you are construing a different provision. Because the Court in those cases held the words were conditional it does not follow that other words are to be so construed. The decisions are only binding when the bequest is ascertained to be conditional by independent construction. They do not lay down any rule what bequests are to be so considered; no canon of construction is established by either of the cases for this purpose.

I confess that I find it difficult to understand these two decisions. As to *Brown* v. *Peck* (1), the legatee must have been entitled to the gift of £2 a month. That was not affected by any illegality. If the reason given in the short report be good, she was entitled to the £5 a month as well as the £2. The only mode of arriving at the decision was by treating it as an annuity of £5 a month during the joint lives of the husband and wife, cut down to £2 a month if they lived together. I should have had great difficulty in so construing it. But such a bequest is altogether different from a gift of a weekly payment during a period only defined by the legatee living apart from her husband. In that respect the wording of the bequest in this case differs materially from that in *Brown* v. *Peck*.

Here the payments are to be made "during such time as she may live apart from her husband," and there is no alternative life annuity or gift for any longer period. In *Brown* v. *Peck* it was, if she lived with her husband £2 a month, but if she lived from him £5 a month, one or other of those payments being intended to last during the joint lives.

In *Wren* v. *Bradley* (2), however, the gifts more nearly resembled

(1) 1 Eden. 140. (2) 2 De G. & Sm. 49.

the bequest in the present case, especially the gift of interest of one-third of the residue, which was to be paid "during such time as she should continue to live apart." The gift of residue was obviously construed as a life-estate, with a conditional limitation divesting it, which could be rejected. With all respect, I think this construction doubtful. But, again, the words differ from those in the present case. It was more possible to construe the gift as a defeasible life interest than it would be to put that construction upon the words I have to consider.

In one sense the rule rejecting certain conditions, which is borrowed from the Civil Law, is a rule of construction. That is, when you find a legacy coupled with an invalid condition, the will is to be construed as if the condition was not there. But, obviously, it must first be determined whether there is a conditional legacy; and the construction for the purpose is independent of and must precede the application of the rule.

I hold that the legatee in this case is not entitled to any payment of £2 10s., because these payments are not legacies given upon a condition, but are to be made only within certain limits which the Court has no power to alter.

G. I. F. C.

Mrs. *Maconochie* appealed, and the appeal was argued on the 7th and 8th of June, 1888.

Marten, Q.C., and *Whitehouse*, for the Appellant:—

According to the rule of the Civil Law, which has been adopted by our Courts as to legacies of pure personalty, *Harvey* v. *Aston* (1); *Reynish* v. *Martin* (2), where a gift is made subject to a condition, whether precedent or subsequent, which is illegal as involving *malum prohibitum* but not *malum in se*, the gift takes effect discharged from the condition. Thus in *Tennant* v. *Braie* (3), a bequest to a woman "if she will be divorced from her husband" was held to take effect as an absolute legacy. In *Brown* v. *Peck* (4) the testator directed that if his niece lived with her husband his executors should pay her £2 per month and no

(1) 1 Atk. 361.
(2) 3 Atk. 330.
(3) Toth. Ed. 1820, p. 78.
(4) 1 Eden. 140.

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more, but if she lived apart from him and with her mother they should allow her £5 per month. She was held entitled to £5 per month, the condition being rejected. In *Wren* v. *Bradley* (1), the testator gave an annuity to his daughter in case she should be living apart from her husband and should continue to do so during the life of the testator's wife. At the date of the will they were living apart, but at the death of the testator were living together—the daughter was held entitled to the annuity.

[FRY, L.J. :—In that case there was a subsequent clause of forfeiture if she should live with him.]

In *Bean* v. *Griffiths* (2) there were words expressing the duration of the gift, but they did not prevent the gift from being held one on condition, and the condition was rejected.

[COTTON, L.J. :—That case seems to turn on the clause cutting down the annuity.

FRY, L.J. :—In both of the last two cases there is a clause of cesser, which is inconsistent with reading the first part of the gift by way of limited gift as opposed to a gift on condition.]

Brown v. *Peck* (3) is recognised in *Cartwright* v. *Cartwright* (4). In *Bellairs* v. *Bellairs* (5), *Jessel*, M.R., adverted to the difference between limitation and condition, and shewed how the illegality of the condition might have been evaded by means of a limitation. If a feoffment is made subject to an illegal condition precedent the condition is void and the feoffment good : *Co. Litt.* (6). The law is summed up in *Roper* on Legacies (7), that where a condition precedent is *malum in se* the gift is void, but where it is only *malum prohibitum* it is rejected and the gift stands. Now the separation of husband and wife cannot be regarded as *malum in se*, it is against the policy of the law, but is neither criminal nor illegal. The refined distinctions between conditions and limitations which have been introduced into cases relating to restraint of marriage ought not to be applied here. They were introduced in order to evade the rule of the Civil Law making every restraint

(1) 2 De G. & Sm. 49.
(2) 1 Jur. (N. S.) 1045.
(3) 1 Eden. 140.
(4) 3 D. M. & G. 982.
(5) Law Rep. 18 Eq. 510.
(6) 206 b.
(7) Chap. xiii. sect. 1.

of marriage illegal: *Stackpole* v. *Beaumont* (1). In *Wren* v. *Bradley* (2), *Bean* v. *Griffiths* (3), and *Brown* v. *Peck* (4), the words were as much in the form of a limitation as here, but they were held to be conditional and were rejected.

Ince, Q.C., and *Method*, for the residuary legatee :—

This is a case of limitation, not of condition properly so called. The living apart from the husband is the only means you have of measuring the gift. If rejecting the condition leaves the gift, the gift is effectual, but here striking out the condition strikes out the gift, as it takes away the means of ascertaining the *quantum*. This is not a gift to a person on condition of her doing something, but a gift to continue during a period defined by reference to living separate. *Tennant* v. *Braie* (5) was a gift of a lump sum.

[FRY, L.J.:—In *Wren* v. *Bradley* the condition seems to have been the measure of the gift.]

It appears possible in that case to make out an interest defeasible on an illegal condition. According to the cases in *Jarman* on Wills (6), the motive of the gift is to be looked to, whether it appears to have been made for the purpose of promoting separation. Where the contract is in general terms to make a provision during separation, the Court will not enforce it, for it cannot separate the good and bad motives: *Cocksedge* v. *Cocksedge* (7). The observations of Lord *Eldon* in *Earl of Westmeath* v. *Countess of Westmeath* (8) tend the same way: *Webster* v. *Webster* (9). A provision tending to induce separation is illegal: *Cartwright* v. *Cartwright* (10). *Brown* v. *Peck* was not argued. *Wren* v. *Bradley* only follows it.

Marten, in reply :—

This is not a limitation but a double condition, the woman

(1) 3 Ves. 89.
(2) 2 De G. & Sm. 49.
(3) 1 Jur. (N.S.) 1045.
(4) 1 Eden. 140.
(5) Toth. Ed. 1820, p. 78.
(6) 4th Ed. vol. ii. p. 12.
(7) 14 Sim. 244.
(8) Jac. 126, 137.
(9) 4 D. M. & G. 437.
(10) 3 D. M. & G. 982.

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must separate and continue to live separate: *Williams* on Executors (1); *Swinburne* (2).

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The question we have to decide is whether the trustee of the will of Mr. *John Moore* ought to pay the sum of £2 10*s.* per week to Mrs. *Maconochie*, a sister of the testator. The testator by his will gave all his property to a trustee "upon trust (after payment thereout of my debts, funeral and testamentary expenses) to pay to my sister *Mary Maconochie* during such time as she may live apart from her husband before my son attains the age of twenty-one years the sum of £2 10*s.* per week for her maintenance while so living apart from her husband." When the will was made, Mrs. *Maconochie* was living with her husband, and continued to do so until after the testator's death. The testator did not like the husband, and his apparent object was to induce the wife to live separate from him. If so, the gift was for a purpose which is contrary to the law of *England*, for that law does not allow provisions made in contemplation of a future separation between husband and wife. The Appellant contends that the gift is to operate as a direction that £2 10*s.* per week shall be paid to her from the death of the testator, though she is living with her husband, thus entirely altering the amount of the gift made to her by the testator. She contends that the gift is a gift of personalty subject to an illegal condition precedent, and that according to the doctrine of the Civil Law, which has been adopted by our law as to personal legacies, the illegal condition may be rejected, leaving the gift absolute. The rule is thus stated by Mr. *Jarman* (3): "But with respect to legacies out of personal estate, the Civil Law, which in this respect has been adopted by Courts of Equity, differs in some respects from the Common Law in its treatment of conditions precedent; the rule of the Civil Law being that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is

(1) 8th Ed. p. 1264. (2) Part 4, sect. 5.
(3) *Jarman* on Wills, 4th Ed. vol. ii. p. 12.

absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the Civil agrees with the Common Law in holding both gift and condition void."

According to English law if a condition subsequent which is to defeat an estate, is against the policy of the law, the gift is absolute, but if the illegal condition is precedent there is no gift. In the Civil Law a distinction is taken between what is *malum in se* and what is only *malum prohibitum*, but in the view I take of this case we need not consider within which of these two classes the restriction in the present case falls. Are the words relating to living separate a condition? In my opinion they are not a condition, but a part of the limitation, and although in some respects a condition and a limitation may have the same effect, yet in English law there is a great distinction between them. Here if you give effect to the Appellant's contention, you give her what the testator never intended to give her, an annuity during the whole of her life if the son is so long under age. It is wrong to give to an expression a forced construction in order to prevent a particular result that follows from the natural construction. The construction does not depend on the Civil Law, and the Civil Law is binding only so far as it has been adopted by our Courts. I therefore do not enter into the question whether the Civil Law regards this as a condition or a limitation, for, if it regards it as a limitation and yet applies the same rules to it as to a condition, no authority has been cited to shew that the Civil Law has to that extent been followed in *England*. Many authorities have been cited, but it has not been laid down in any of them that a gift in this form is to be treated as a gift upon condition. In *Tennant* v. *Braie* (1), upon the fair construction of the words, the gift was a gift upon condition, not a limited gift. A sum was to be paid once for all if a woman was divorced. There was nothing imposing a limit on the duration of the gift. In *Brown* v. *Peck* (2), the report is not clear either as regards the

(1) Toth. Ed. 1671, p. 141; Ed. 1820, p. 78. (2) 1 Eden. 140.

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facts or the principle laid down. The testator, after noticing that his niece had married without the consent of her mother, directed that if she lived with her husband his executors should pay her £2 per month and no more, but if she lived from him and with her mother, then they should allow her £5 per month. Lord *Henley* treated this as a condition, for he says "the condition annexed being both impossible at the time of imposing it, and *contrà bonos mores*, the legacy was simple and pure." What was meant by "impossible" it is hard to say, but that is not material. All that is of importance is that it was treated as a condition, and the words could reasonably be so construed. *Wren* v. *Bradley* (1) occasions more difficulty. There was first a gift of an annuity to the testator's daughter subject to conditions which were *contrà bonos mores*. Then there was a gift of the income of one-third of an accumulated fund to the same daughter, "during such time as she shall continue to live apart from her said husband *Abraham Wren*," and then came a condition in the form of a subsequent condition, that if she should at any time cohabit with her husband, then during such time as she should cohabit with him the income should be paid to other persons. It was proved that at the date of the will she was living apart from her husband. The Vice-Chancellor appears to have been impressed by that, and to have looked at the gift of the income as an immediate gift of it to the wife, subject to a proviso that if she returned to cohabitation the trust for payment to her should cease. I think this was the real ground of his decision, though he does not clearly state his reasons. I think his view must have been that, she being at the time separated from her husband, the gift was a simple gift to her with a subsequent condition defeating it if she returned to cohabitation. If that construction of the will be adopted as correct there is no difficulty about the decision, for as to the annuity the rule of the Civil Law clearly applied. None of the cases in my judgment warrant our applying it here, and in my opinion Mr. Justice *Kay* came to a correct conclusion. The gift here is not a gift of an annuity subject to a condition, but a limited gift, the commencement and duration of which are fixed in a way which the law does not allow.

(1) 2 De G. & Sm. 49.

BOWEN, L.J.:—

I am of the same opinion. At the date of the will the testator's sister was living with her husband. The testator directs his trustees to pay to her during such time as she may live apart from her husband, before the testator's son attains twenty-one, £2 10*s.* per week for her maintenance whilst so living apart from her husband. There can be no question that the object of this gift was to promote separation, an object which is against the policy of the law, and Mr. Justice *Kay* has decided that the gift is bad.

The argument for the Appellant was twofold. First, she contended that the condition was subsequent and might be rejected leaving the gift absolute; secondly, that if it was a condition precedent, this being a gift out of pure personalty, the doctrine of the Civil Law applied and the gift was absolute, for which *Harvey* v. *Aston* (1) and *Reynish* v. *Martin* (2) were referred to, where Lord *Hardwicke* states the rule of the Civil Law and the extent to which our Courts have adopted it. There is a great distinction in our law between conditions precedent and subsequent. Lord *Hardwicke*, in *Reynish* v. *Martin*, says (3): "The Civil Law considering the condition, whether precedent or subsequent, as unlawful, and absolutely void, the legacy stands pure and simple. But in our law, where the condition is precedent, the legatary takes nothing till the condition is performed, and consequently has no right to come and demand the legacy; but it is otherwise where the condition is subsequent, for in that case the legatary has a right, and the Court will decree him the legacy; but this difference only holds where the legacy is a charge on the real assets, and therefore, if this had been merely a personal legacy, should have been of opinion that as the marriage without consent would not have precluded *Mary* of her right to this legacy in the Ecclesiastical Court, no more would it have done so here: and to this purpose several cases were cited, which are taken notice of in the case of *Harvey* v. *Aston*, and which I shall not repeat, but refer to that case for them." Accepting that as law with respect to legacies of personal estate on a condition, the question remains

(1) 1 Atk. 361. (2) 3 Atk. 330.
(3) 3 Atk. 332.

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whether this is a legacy on a condition. If not, then, unless it can be shewn that the rule of the Civil Law extends to limitations as well as to conditions, and that our law has adopted it to that extent, the rule cannot apply. Is there here a condition? In one sense the gift does contain a condition, but it contains something more than either a condition precedent or a condition subsequent, and must be held to create a limitation. If the subject of gift here had been real estate this would have been a limitation not a mere condition, just as a gift to a woman *dum sola vixerit* is a conditional limitation not a mere condition. But why should that be held to be a mere condition in the case of personalty which is not so in the case of realty? Here the sister's living apart from her husband is the measure of the gift to her, and if that be taken away the *quantum* of the gift is altered. This was the ground taken by Mr. Justice *Kay*. No authority has been cited to shew that limitations are treated by the Civil Law in the same way as conditions, but if they were it would not follow that they should be so treated in our Courts. This is a gift which begins when the sister begins to live apart from her husband, continues while she lives apart from him, and comes to an end when she ceases to live apart from him.

As regards the cases cited, *Tennant* v. *Braie* (1) is a case of a gift upon condition, though it is so meagrely reported that I should hesitate before acting upon it. *Brown* v. *Peck* (2) appears to have been compromised after an expression of opinion by the Court. *Wren* v. *Bradley* (3) is a peculiar case. There were two gifts, the first of which was clearly a gift on condition; the second gift, is more difficult. I think that the Vice-Chancellor considered the context of the will to throw light on the second gift, and to lead to the conclusion that it was a gift to a woman who was at the time living separate from her husband with a condition defeating it if she returned to cohabitation. The cases therefore do not support the view that the doctrine of the Civil Law is to be extended to limitations, and in my opinion the Judge below came to a right conclusion. One regrets taking away a dead man's bounty from the object of it under the very

(1) Toth. Ed 1820, p. 78. (2) 1 Eden. 140.
(3) 2 De G. & Sm. 49.

circumstances in which he intended her to have it, but we must not depart from the law.

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FRY, L.J.:—

I am of the same opinion.

Solicitors for Plaintiff: *Williamson, Hill & Co.*, agents for *Trafford & Cook, Northwich.*

Solicitors for Mrs. *Maconochie: Brownlow & Howe*, agents for *T. M., J. & A. Whitehouse, Wolverhampton; Emmet, Son & Stubbs*, agents for *A. W. Barradale, Dudley.*

H. C. J.

ANDREWS *v.* BARNES.

C. A.
1887
KAY, J.
Dec. 15, 19.
1888
C. A.
May 29, 30; *June* 12.

[1886. A. 1632]

Practice—Costs as between Solicitor and Client—Jurisdiction—Action against Trustees of a Charity Fund—Unjustifiable Litigation.

The Court of Chancery formerly had, and the High Court of Justice now has in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client.

Whether the High Court has the same power in matters of common law jurisdiction, *quære.*

Cockburn v. *Edwards* (1) questioned.

Mordue v. *Palmer* (2) approved.

An action was brought by the vicar and churchwardens of a parish to recover from the Defendants a fund of small amount which had been handed over to them upon trust for a charitable purpose connected with the parish, but, as the Plaintiffs alleged, upon a condition which had become incapable of fulfilment. The Plaintiffs failed to make out their case. The Court, in dismissing the action, being of opinion that it had been brought wholly without justification, ordered the Plaintiffs to pay the costs of the Defendants as between solicitor and client; and the Court of Appeal refused to interfere with the judgment.

Considered. REED v. GRAY [1952] 1 Ch. 337

THIS was an action by the vicar and churchwardens of the parish of *St. Luke's, Kentish Town*, seeking to recover from the Defendants, the members of a local committee, the sum of £164 2*s.* 3*d.*, which had been handed over to them for the purpose of providing a church-room for the use of the parish.

(1) 18 Ch. D. 449. (2) Law Rep. 6 Ch. 22.

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The fund had arisen partly from the collections in the church at the offertory and at other times, partly from contributions placed in the alms-boxes at the church, partly from voluntary subscriptions, and partly from the proceeds of a bazaar. The Plaintiffs alleged that the fund had been handed over to the Defendants upon a condition which had not been and could not now be fulfilled.

The action came on to be heard with witnesses before Mr. Justice *Kay* on the 15th of December, 1887, and the hearing occupied the greater part of two days.

His Lordship held upon the evidence that no condition was attached to the fund in the hands of the Defendants, and that it was a charitable fund of which the Defendants were the properly constituted trustees; and he dismissed the action, which he characterized as an idle proceeding.

Marten, Q.C., and *Worthington*, for the Defendants:—

The Plaintiffs ought to pay the costs of the Defendants as between solicitor and client. It is clear that the Court has jurisdiction to order such payment: *Edenborough* v. *Archbishop of Canterbury* (1); *Attorney-General* v. *Compton* (2); *Turner* v. *Collins* (3). In the case last cited *Malins*, V.C., made the order for payment of costs as between solicitor and client expressly on the ground that the defendants were trustees. If the Plaintiffs are only ordered to pay party and party costs, the Defendants will clearly be entitled to have the rest of their costs paid out of this small charitable fund, which will thereby be seriously diminished.

Renshaw, Q.C., and *Swinfen Eady*, for the Plaintiffs:—

The order asked for, even if the Court has jurisdiction to make it, would be a most unusual one. In *Edenborough* v. *Archbishop of Canterbury* the action was brought against public officers, who defended it in that capacity. *Malins*, V.C., in *Turner* v. *Collins* (4), referred to *Jenner* v. *Jenner* (5), and observed that in that case

(1) 2 Russ. 93.
(2) 1 Y. & C. (Ch.) 417.
(3) Law Rep. 12 Eq. 438; 7 Ch. 329.
(4) Ibid. 12 Eq. 440.
(5) 2 D. F. & J. 359.

a strong opinion was expressed as to the unjustifiable nature of the litigation, and yet only party and party costs were given. The present case is not like those in which *cestuis que trust* have brought unjustifiable actions against their trustees. Here the very existence of the trust is a question at issue, and the action is brought by persons claiming to be trustees against other persons claiming adversely in the same capacity.

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[They referred to Rules of the Supreme Court, 1883, Order LXV., r. 1.]

KAY, J.:—

I think that it is the duty of the Court to protect this fund, and, so far as I can, I shall take care that it shall not be burdened with one farthing of the costs of this most unjustifiable litigation. I have always understood that in a proper case the Court has jurisdiction to order the unsuccessful party in an action to pay costs as between solicitor and client. I can hardly conceive a more proper case for the exercise of that jurisdiction than an action like the present, where the Plaintiffs have made an improper attempt to get this trust fund out of the hands of the Defendants, who are the rightful trustees. If party and party costs only were given, the Defendants, as trustees, would be entitled to be paid their extra costs out of this small fund, which I deem it to be my duty to protect to the utmost. Therefore I order the Plaintiffs to pay the costs of the Defendants as between solicitor and client.

C. C. M. D.

The Plaintiffs appealed from this judgment so far as it related to the costs of the action. The appeal came on for hearing on the 29th of May, 1888.

C. A.

Swinfen Eady, for the Appellants:—

The Judge had no jurisdiction to make an order that the Plaintiffs should pay costs as between solicitor and client. The *Judicature Act* has not enlarged the jurisdiction of the Chancery Division as to costs. It has no greater jurisdiction than the old Court of Chancery had: Order LXV., r. 1; *In re Mills' Estate* (1);

(1) 34 Ch. D. 24.

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and that Court had jurisdiction to order costs to be paid as between solicitor and client only in the following cases: (1) where charges of fraud had been made and not sustained, or where untrue or scandalous charges had been made; (2) where a public officer was sued in his official capacity, as in *Edenborough* v. *Archbishop of Canterbury* (1); or (3) where the suit was by a *cestui que trust* against his trustee. All the cases in which costs as between solicitor and client have been given come under one of these three classes: *Turner* v. *Collins* (2); *Christie* v. *Christie* (3); *Poole* v. *Pass* (4); *Attorney-General* v. *Compton* (5); *Attorney-General* v. *Cuming* (6); *Saunders* v. *Saunders* (7); *Forester* v. *Read* (8); *Mordue* v. *Palmer* (9). The present case comes within neither of these classes. It is true that the Defendants are trustees, but the Court has held that the Plaintiffs are not their *cestuis que trust*, and are mere strangers to them. Costs as between solicitor and client cannot be given by way of damages: *Cockburn* v. *Edwards* (10).

[COTTON, L.J., referred to *Dungey* v. *Angove* (11).]

Marten, Q.C., and *Worthington*, for the Defendants:—

The instances cited by the Appellants in which costs have been given between solicitor and client are only examples of the exercise of the jurisdiction of the Court. In none of these is there any decision that the jurisdiction is restricted to the classes of cases instanced. It was taken for granted in all of them that the Court of Chancery had an inherent jurisdiction to order the payment of full costs. *Edenborough* v. *Archbishop of Canterbury* and *Mordue* v. *Palmer* are distinctly in our favour.

[COTTON, L.J., referred to *Ex parte Thorp* (12) where costs as between attorney and client were given against the parties to a fraudulent bankruptcy.]

We contend that in this case the jurisdiction of the Court is

(1) 2 Russ. 93.
(2) Law Rep. 12 Eq. 438; 7 Ch. 329.
(3) Law Rep. 8 Ch. 499.
(4) 1 Beav. 600.
(5) 1 Y. & C. (Ch.) 417.
(6) 2 Y. & C. (Ch.) 139.
(7) 3 Drew. 387.
(8) Law Rep. 6 Ch. 40.
(9) Ibid. 22.
(10) 18 Ch. D. 449.
(11) 2 Ves. 304.
(12) 1 Ves. 394.

clear on the Appellants' own shewing: for the Plaintiffs have alleged that they claim as *cestuis que trust*, and that brings the case within the authorities cited by the Appellants. It is the duty of the Court to protect the trust fund, and if the Plaintiffs do not pay the full costs, the trustees will be entitled to take the difference out of the trust funds. This case is one of the matters specially assigned to the Chancery Division, and that Division has all the jurisdiction as to costs formally enjoyed by the Court of Chancery. *Neaves* v. *Spooner* (1) shews the wide discretion which the High Court has under the *Judicature Acts*.

Swinfen Eady, in reply:—

The following additional authorities were afterwards handed up to the Court by the counsel engaged: *Jones* v. *Coxeter* (2); *Corporation of Burford* v. *Lenthall* (3); *Cartwright* v. *Hateley* (4); *Ex parte Simpson* (5); *Currie* v. *Pye* (6); *Dunlop* v. *Hubbard* (7); *Attorney-General* v. *Haberdashers' Company* (8); *Fenner* v. *Taylor* (9); *Palmer* v. *Walesby* (10).

1888. June 12. The judgment of THE COURT (*Cotton*, *Fry*, and *Lopes*, L.JJ.) was delivered by *Fry*, L.J., as follows:—

In this case the Plaintiffs sought to recover from the Defendants a small sum of money held on trust for certain parochial purposes; the Plaintiffs failed, and Mr. Justice *Kay* dismissed the action, with costs to be paid by the Plaintiffs as between solicitor and client, on the ground that the fund ought to be preserved intact and unimpaired by the Plaintiffs' wrongful claim, and that this would not be the case if the Defendants were to receive the difference between costs on the two scales out of the fund, which, as trustees, they would be entitled to do if not paid by the Plaintiffs. The only question raised is whether Mr. Justice *Kay* had any jurisdiction to make this order. The suit, relating to the custody and possession of a trust fund, is clearly one which would have been proper and peculiar to the Court of

(1) 58 L. T. (N.S.) 164.
(2) 2 Atk. 400.
(3) Ibid. 551.
(4) 1 Ves. 292.
(5) 15 Ves. 476.
(6) 17 Ves. 462.
(7) 19 Ves. 205.
(8) 4 Bro. C. C. 178.
(9) 5 Madd. 470.
(10) Law Rep. 3 Ch. 732.

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Chancery when that Court existed, and the question therefore is whether that Court had jurisdiction to make such an order in such a case.

The jurisdiction of the Lord Chancellor in costs was essentially different from that at common law. "The giving of costs in equity," said Lord *Hardwicke* in *Jones* v. *Coxeter* (1) "is entirely discretionary, and is not at all conformable to the rule at law." "Courts of Equity," said the same great Judge in another case, "have in all cases done it" (*i.e.*, dealt with costs) "not from any authority" (*i.e.*, as we understand, from any statutory or delegated authority)—"but from conscience and *arbitrio boni viri*, as to the satisfaction on one side or other on account of vexation:" *Corporation of Burford* v. *Lenthall* (2).

An examination of the older General Orders of the Court made, not under any statutory authority, but from the general and inherent authority of the Lord Chancellor, will shew that the Court exercised a most wide discretion not only as to the circumstances under which costs were to be awarded, but apparently as to the measure and fullness of the costs. These General Orders will be found to use very varied language expressing different measures of estimation. We have references not only to costs and "ordinary costs" (Ord. 17th November, 1635, *Saunders*, p. 180), but to "full costs" (Ord. 22nd August, 1654, *ibid*, p. 262); "full costs and charges in travel, attendance, and otherwise" (*ibid.* p. 265); "good costs" (Ord. 14th January, 1617–8, p. 219, 17th November, 1635, p. 183); "very good costs" (Ord. 17th November, 1631, p. 66, 25th June, 1658, p. 280); "utmost costs to be assessed by the Court" (Ord. 29th January, 1618–9, p. 116); "uttermost coste and charge to be assessed by the Court" (Ord. April, 1596, p. 69); "double costs" (Ord. 17th November, 1635, p. 182); "treble costs and quadruple costs" (Ord. 29th January, 1618–9, p. 117). It would be useless to attempt to ascertain the precise value of the expressions used, but they are inconsistent with any notion that the Court was confined to one measure of costs.

The same control over the amount of costs is shewn by the language frequent in such orders, which asserts the full discretion of the Court in this matter. "Such costs as the Court shall think

(1) 2 Atk. 400. (2) 2 Atk. 551.

reasonable" (Ord. 29th October, 1683, p. 359) and "such costs as their Lordships shall think fit to inflict" (Ord. 29th October, 1692, p. 397) are instances of numerous like expressions. Again, the makers of these orders exercised a right to fix arbitrarily the amount of costs to be paid in particular cases. Thus in 1669 (Ord. 12th February, 1669–70, p. 335) 10*s.* was fixed as the costs to be paid for every frivolous exception to a Master's report, which in 1689 (Ord. 17th January, 1689–90, p. 387) was increased to 20*s.*; and many similar instances may be found. Lastly, in the particular case now before us of the failure of the Plaintiffs, we find the Orders of 22nd August, 1654 (p. 265) providing that the plaintiff should pay the defendant "his full costs upon a bill of costs to be allowed by the Six Clerks, or any two of them; and in case the Court upon the hearing shall find the suit to have been vexatious, the Court shall give additional costs against a plaintiff, to be pronounced by the Court at the hearing, besides the said costs to be taxed upon the bill."

The jurisdiction of the Court of Chancery in the matter of costs has been supposed by an eminent writer on the subject, Mr. *Beames*, to be derived from the recently repealed statute, 17 Rich. 2, c. 6, which enacts that "forasmuch as people be compelled to come before the King's Council, or in the Chancery by writs grounded upon untrue suggestions, that the Chancellor for the time being, presently after that such suggestions be duly found and proved untrue, shall have power to ordain and award damages according to his discretion, to him which is so troubled unduly, as afore is said." It may be that costs are included under the word "damages." But it will be observed, as has indeed been long ago pointed out by *Coke* (1), that the jurisdiction thus given only arose after proof of the untruth of the allegations, and, therefore, could be exercised only on or after the hearing of the cause. It cannot, therefore, be the foundation of the jurisdiction to award costs in all stages of the suit, and for the insufficiency as well as the untruth of the matters alleged.

The records of the Court of Chancery during the last century shew that in numerous cases it has exercised the right of giving costs between attorney and client, or, to use the more recent

(1) 4 Inst. 83.

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language of the cases, between solicitor and client. Such costs were awarded in the cases of *Attorney-General* v. *Haberdashers' Company* (1) and *Currie* v. *Pye* (2) to an heir-at-law made a party to a suit relative to a charity; in *Ex parte Thorp* (3) to creditors of a bankrupt who, as petitioners, applied in bankruptcy to set aside a commission fraudulently sued out to clear the bankrupt from his debts; in *Dungey* v. *Angove* (4) to a landlord made defendant by a tenant to a bill of interpleader, which had been brought by the tenant in collusion with a stranger; in *Ex parte Simpson* (5), and numerous other cases on the ground of scandal; in *Edenborough* v. *Archbishop of Canterbury* (6) to the *Attorney-General*, and also to the *Archbishop of Canterbury* and the *Bishop of London*, where the plaintiff sought to restrain the induction of a particular person; in *Palmer* v. *Walesby* (7), against the next friend to a person in whose name a bill had been filed by this next friend falsely alleging him to be of unsound mind. In none of the cases which we have consulted has the Court stated any limitation of its jurisdiction to award costs as between solicitors and client, though various circumstances have been stated as influencing the discretion of the Court—in some cases to vindicate the honour and justice of the Court, and in *Palmer* v. *Walesby* on the ground of the right of the applicant to indemnity, the reason assigned by Mr. Justice *Kay* for awarding them in the present case.

The general jurisdiction of the Court of Chancery in this respect is stated with great clearness by the Lords Justices in the case of *Mordue* v. *Palmer* (8). In the course of a Chancery suit a reference was made to arbitration, which ordered that the costs should be in the discretion of the arbitrator. He awarded them as between solicitor and client, and the Court of Appeal held that as the reference was in Chancery the arbitrator had power so to do. "The Common Law Courts," said Lord Justice *Mellish* (9), "have no power to give costs between

(1) 4 Bro. C. C. 178.
(2) 17 Ves. 462.
(3) 1 Ves. 394.
(4) 2 Ves. 304.
(5) 15 Ves. 476.
(6) 2 Russ. 93.
(7) Law Rep. 3 Ch. 732.
(8) Ibid. 6 Ch. 22.
(9) Law Rep. 6 Ch. 32.

solicitor and client, and therefore, when there is a reference, the arbitrator cannot give any other than costs between party and party. But it is otherwise with Courts of Equity; and I therefore think that, when a reference as to costs is made by a Court of Equity, the Court gives the arbitrator jurisdiction to award costs as between solicitor and client if he shall think fit."

It was argued that in *Cockburn* v. *Edwards* (1) a different view was taken by the Court of Appeal, but the question there only arose indirectly, and the point does not appear to have been argued. If, therefore, there is any discrepancy between this case and *Mordue* v. *Palmer* (2) we think that the decision in the latter case must prevail, not only as more express, but as being in accordance with the earlier authorities.

From this consideration of the earlier authorities we conclude that there was inherent in the Court of Chancery at the time of its abolition a general and discretionary power to award costs as between solicitor and client to a successful party, as and when the justice of the case might so require, and that Mr. Justice *Kay* therefore had jurisdiction to make the order which he pronounced, and consequently that this appeal fails.

As the nature of the suit was one of equitable jurisdiction, the question whether the Judges of the High Court have any power to award costs as between solicitor and client in matters of common law jurisdiction does not arise, and on it we express no opinion.

Solicitor for the Plaintiffs: *T. Blair.*
Solicitor for the Defendants: *G. M. Jameson.*

(1) 18 Ch. D. 449. (2) Law Rep. 6 Ch. 22.

M. W.

ctum of BOWEN, L.J., at p. 147, *plied. Re* VAN DEN BERGH'S WILL *USTS.* [1948] 1 All E.R. 935.

pplied. Re MANNERS (*decd.*). [1949] All E.R. 201.

C. A.
1888
KEKEWICH, J.
March 19.
C. A.
June 19, 20.

HORLOCK *v.* WIGGINS.
WIGGINS *v.* HORLOCK.

[1887 H. 1214.]

Satisfaction—Cotemporaneous Deed and Will.

By a separation deed, dated the 7th of September, 1844, the husband covenanted that his executors or administrators should on his decease pay to his wife, if she survived him, £100; with a proviso that if £6 per month was paid her for six months from his death, the balance should only be paid at the end of that period. By his will, dated the 5th of September, 1844, but alleged to have been signed on the 9th, "after all my just debts, funeral and testamentary expenses are paid, I bequeath to my wife £100 payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100 as per indenture stated in our mutual separation":—

Held (affirming the decision of *Kekewich*, J.), that the legacy was not in satisfaction of the sum covenanted by the deed to be paid, but that the widow was entitled to both sums.

The circumstance that two documents are cotemporaneous, so that both are present to the mind of the donor when he executes each of them, is a strong reason against holding a gift in one to be a satisfaction of an obligation under the other to pay a like sum.

BY a deed, dated the 7th of September, 1844, executed on the separation of Mr. and Mrs. *Wiggins*, Mr. *Wiggins* covenanted with the Plaintiff, the trustee of that deed, that his heirs, executors, or administrators should, out of his estate and immediately after his decease, pay to Mrs. *Wiggins* £100 if she should survive him: provided always, that if £6 per calendar month should be paid to Mrs. *Wiggins* for the six months immediately following the death of Mr. *Wiggins*, the first of such payments being made within one calendar month from such death, then, notwithstanding anything thereinbefore contained, the said sum of £100 should be payable as to £36 by such monthly instalments of £6, and the balance of £64 immediately after the expiration of such six calendar months from the death of Mr. *Wiggins*.

Mr. *Wiggins* by will, dated the 5th of September, 1844, bequeathed as follows:—

"After all my just debts, funeral (very plain) and testamentary

expenses are paid, I will and bequeath to my wife *Sarah* the sum of £100, payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100 as per indenture stated in our mutual separation."

Mr. *Wiggins* died in February, 1887. In March the Plaintiff, as trustee of the separation deed, commenced this action in the Queen's Bench Division against the executors to recover the £100.

The executors put in a statement of defence, and a counterclaim the Defendants to which were the Plaintiff and Mrs. *Wiggins*, and asked for a declaration that the bequest in the will was to be deemed to have been given in satisfaction of the covenant in the separation deed.

There appeared to be some uncertainty as to the time when the will was in fact executed, the executors stating that it was in fact executed on the 9th of September, 1844.

The action was transferred to the Chancery Division, and was tried by Mr. Justice *Kekewich* on the 19th of March, 1888.

F. T. Procter, for the Plaintiff and Mrs. *Wiggins*, cited *Chichester* v. *Coventry* (1); *Dawson* v. *Dawson* (2); *Edmunds* v. *Low* (3); *Cole* v. *Willard* (4); *Pinchin* v. *Simms* (5); *Rowe* v. *Rowe* (6); *Hassell* v. *Hawkins* (7); *Atkinson* v. *Littlewood* (8).

Warmington, Q.C., and *P. F. S. Stokes*, for the executors.

KEKEWICH, J.:—

This seems to me to be one of those cases in which the Court is bound to arrive at a conclusion without having any satisfactory means of arriving at it. The only guide I have is this. I am entitled to sit in the testator's chair as he wrote his own will, for I am told that it was written by himself. It was executed after he had executed the deed, or, at any rate, after that deed had

(1) Law Rep. 2 H. L. 71.
(2) Ibid. 4 Eq. 504.
(3) 3 K. & J. 318.
(4) 25 Beav. 568.
(5) 30 Beav. 119.
(6) 2 De G. & Sm. 294.
(7) 4 Drew. 468.
(8) Law Rep. 18 Eq. 595.

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been prepared and engrossed. The deed must, therefore, be taken to have been in his mind when he signed his will. I must treat him then as having in his mind, when he signed his will, that he had covenanted that his heirs, executors, or administrators would out of his estate and immediately after his decease pay to his wife £100 if she survived him, with a proviso that, if £6 per month was paid for six months, the balance of £64 should be paid in a lump sum. By his will he says, "after all my just debts and funeral and testamentary expenses are paid, I will and bequeath to my wife *Sarah* the sum of £100." I think the debts must be taken to include the debt contracted by the separation deed. But that does not dispose of the case, for he directs the payment to be made in a particular way. Reference was made to *Chichester* v. *Coventry* (1) and *Edmunds* v. *Low* (2). *Chichester* v. *Coventry* called particular attention to the great weight to be given to a direction for payment of debts coming before a gift which might be taken to be a gift in satisfaction of a liability. In *Edmunds* v. *Low* the Vice-Chancellor did not give so much weight as I am disposed to give in the present case to the direction for payment of debts, but the case was very different from the present.

Bearing these cases in mind, I will compare shortly the words of the will and the deed. The covenant in the deed was to pay £100 immediately after the testator's decease, but if £6 per month was paid for six calendar months then the balance was not to be paid till the end of the six months. The gift by the will is of £100 to be paid within six months, but then the testator goes on to say, "£6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100 as per indenture stated in our mutual separation." Construing the testator's words as well as I can without making guesses as to his intention, I think this must be taken to mean, "This £100 which I have bequeathed is to be satisfied in the same way as the £100 which I am under a covenant to pay, and which by the deed is payable by instalments of £6 per month for six months, and the balance at the end of that time." I think, therefore, that Mrs. *Wiggins* is entitled to both the sums of £100.

(1) Law Rep. 2 H. L. 71. (2) 3 K. & J. 318.

The executors appealed, and the appeal was heard on the 19th and 20th of June, 1888.

P. F. S. Stokes, for the Appellants:—

The testator, in his bequest of £100 to his wife, referred to the same sum as he was bound to pay under the separation deed. Where the sum and the person to receive it are the same in both documents, there is a presumption that the second gift is intended to be a satisfaction of the former. Where the difference between the two gifts is slight, that is not sufficient to rebut the presumption. Here the mode of payment only is different: *Montagu* v. *Earl of Sandwich* (1); *Chichester* v. *Coventry* (2); *Wathen* v. *Smith* (3); *Edmunds* v. *Low* (4); *Hinchcliffe* v. *Hinchcliffe* (5); *Chaplin* v. *Chaplin* (6). The fact that the two documents were cotemporaneous makes no difference, for the deed is recited in the will, and the debt is thereby admitted by the testator to be in existence.

[COTTON, L.J.:—Is there any case on satisfaction where the documents have been cotemporaneous?]

[Counsel on both sides stated that they had not been able to find any such case.]

F. T. Procter, *contrà*, was not called on.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kekewich* that Mrs. *Wiggins* is entitled both to the £100 provided for her by the separation deed and to the legacy of £100 bequeathed to her by her husband's will. The only fact I need mention is that the will and the deed were substantially cotemporaneous. Whichever of the two was prepared first, they were executed so nearly at the same time that they must be looked upon as cotemporaneous.

The question, then, is whether the testator intended the legacy to be a payment of what was given by the deed. The gift by the

(1) 32 Ch. D. 525.
(2) Law Rep. 2 H. L. 71.
(3) 4 Madd. 325.
(4) 3 K. & J. 318.
(5) 3 Ves. 516.
(6) 3 P. Wms. 245.

C. A. 1888 HORLOCK v. WIGGINS. WIGGINS v. HORLOCK. Cotton, L.J.

will is this:—"After all my just debts, funeral and testamentary expenses are paid, I will and bequeath to my wife *Sarah* the sum of £100, payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100 as per indenture stated in our mutual separation." There was in the covenant a direction that if £6 per calendar month was paid to Mrs. *Wiggins* for six months after the decease of Mr. *Wiggins*, the amount of these sums should be deducted from the £100, and the balance only paid at the end of the six months. What is the meaning of the will, apart from any presumption as to satisfaction? A gift of £100. The only argument against its being an independent gift is founded on the words at the end, and I do not think them sufficient to shew that the testator intended by his will only to provide for payment of the sum provided for by the covenant in the separation deed.

Then it is urged that there is a presumption that one gift was intended to be in satisfaction of the other, and that Mrs. *Wiggins* must elect. In my opinion no such presumption arises in this case. The direction to pay the legacy is given after payment of all the testator's just debts, and the instrument creating an obligation to pay the £100, which would be a debt, is so nearly connected in point of time with the execution of the will that they must be treated as cotemporaneous. I do not say that in no case can a presumption of satisfaction arise where the documents are cotemporaneous; but their being so is an important consideration, and I can hardly conceive the possibility of two documents, each giving the wife £100, being executed at the same time, if it was intended that she should only have one sum of £100.

BOWEN, L.J.:—

I am of the same opinion. On the construction of the will I think there is not enough to shew that the £100 there mentioned was the same sum as the £100 provided by the separation deed. But it is contended that the presumption ought to be applied that a gift by a subsequent will of the same amount as what has been given by deed is to be received in satisfaction of the prior gift. But what is the character of this presumption? It goes on the

ground that the benefit given by the will is to be taken as given on an implied condition that it is to be taken in satisfaction of the benefit given by the deed. Though this presumption is artificial, we ought to act upon it in cases to which, according to the authorities, it is applicable; but we ought not to create fresh artificial presumptions. The language of this will falls short of the conclusion that the testator intended by his will the same £100 as was mentioned in the covenant. The will directs payment of the bequest after payment of the testator's just debts, and the £100 in the separation deed was a debt existing when the will was made. Then, again, the two documents, as regarded the testator's mind, were cotemporaneous, which is a circumstance to be considered, for the presumption arises not on the will, but on the circumstances of the case. We ought, therefore, to look at all the circumstances, and the relative positions of the two documents in point of time may be decisive, is often material, and is always relevant. I think it would be wrong to raise the presumption in this case.

FRY, L.J.:—

I am of the same opinion.

Solicitors for Plaintiff: *Blewitt & Tyler.*
Solicitors for Defendants: *Armstrong & Lamb.*

H. C. J.

KAY, J.
1888
June 7, 14.

In re JUPP.
JUPP *v.* BUCKWELL.

[1888 J. 417.]

Husband and Wife—Will—Construction—Gift to Husband and Wife and Third Person—Unity of Person of Husband and Wife—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 5.

The rule of construction whereby, under a gift to a husband and wife and a third person, the husband and wife take only one moiety between them, has not been altered by the *Married Women's Property Act*, 1882.

A testator, by his will made in 1887, directed that a share of his residuary estate should be divided between his "sister *M. B.*, *D. B.*, her husband, and *H. B.*, her step-daughter, in equal parts." *M. B.* and *D. B.* were married previously to the commencement of the *Married Women's Property Act*, 1882:—

Held, that *M. B.* and *D. B.* each took one-fourth, and *H. B.* one-half of the share, the one-fourth of *M. B.* being her separate property according to the Act.

Adjourned summons.

Stephen Jupp, who died on the 25th of November, 1887, by his will, dated the 17th of November, 1887, after directing that a freehold property and certain shares belonging to him in a company should be sold as his executor should think best, and requesting his executor to pay his debts, and the expenses incurred in the administration and execution of his will, directed that the residue of his estate should be divided into five equal shares, one share to be divided between his deceased brother *John's* children (whom he named) in equal parts; "and one share between my sister *Mary Buckwell*, *Daniel Buckwell*, her husband, and *Harriet Buckwell*, her step-daughter, in equal parts," one share between his deceased brother *Henry's* widow and children (whom he named) in equal parts; one share between his deceased brother *James's* widow and children (whom he named) in equal parts, and the remaining share between his deceased brother *George's* children (whom he named) in equal parts; and the testator appointed the Plaintiff, *George Jupp*, his sole executor.

Daniel and *Mary Buckwell* were married before the commencement of the *Married Women's Property Act*, 1882.

This was a summons by *George Jupp*, Plaintiff, against *Mary Buckwell*, *Daniel Buckwell*, and *Harriet Buckwell*, Defendants, to have it determined whether the legacy bequeathed by the will to the Defendants should be divided between them in the proportion of one third to each person, or in any other way.

Haycraft, for the Plaintiff and the Defendants *Mary Buckwell* and *Daniel Buckwell*:—

Under this gift the Defendants take in equal thirds. The will having been made after the commencement of the *Married Women's Property Act*, 1882, the case is governed by the decision of Mr. Justice *Chitty*, in *In re March* (1). That decision was, it is true, reversed on appeal (2), but only on the ground that the will in that case, which was made before the commencement of the Act, must be construed according to the law existing at the time when it was made. The old rule that under a gift to a husband and wife and a third person the husband and wife take a moiety only is a rule of construction, founded on the old law that husband and wife were one person: *Co. Litt.* (3) But that law has been altered. The effect of the recent Act is that husband and wife are no longer one person for the purpose of acquiring property. The wife can now acquire as a *feme sole*, and she cannot therefore be one person with the husband for the purpose of acquisition.

Moreover, the rule is one which readily yields to any indication of intention by a testator that husband and wife should take separately: *Dias* v. *De Livera* (4); *Paine* v. *Wagner* (5); *Marchant* v. *Cragg* (6); and the relationship of the legatees to the testator is a matter to be considered: *Warrington* v. *Warrington* (7). The terms of this will shew an intention on the part of the testator that all the several shares should be divided equally between the members of the several branches of his family, and it is very improbable that he intended the step-daughter of his sister to take one half of this share, and his sister herself only a fourth.

(1) 24 Ch. D. 222.
(2) 27 Ch. D. 166.
(3) 187 a.
(4) 5 App. Cas. 123, 136.
(5) 12 Sim. 184.
(6) 31 Beav. 398.
(7) 2 Hare, 54.

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[KAY, J., referred to *Butler* v. *Butler* (1); and *Reid* v. *Reid* (2).]

Haldinstein, for the Defendant *Harriet Buckwell*:—

This Defendant is entitled to one moiety of the share in question. The judgment of Mr. Justice *Chitty*, in *In re March* (3), is not a binding authority, and is opposed to the opinion expressed by Mr. Justice *Wills* in *Butler* v. *Butler* (4). The old rule of construction is not affected by the *Married Women's Property Act*, 1882. The Act does not alter the *status* of a married woman, nor affect her power of acquiring property, but only the manner in which property is to be held by her when acquired. It was not intended to, and does not, alter any rights except those of husband and wife *inter se*: *In re March* (5); and it only affects those rights so far as is expressed in the Act and no further: *Palliser* v. *Gurney* (6): *Scott* v. *Morley* (7); *Wennhak* v. *Morgan* (8); and Mr. Justice *Chitty* himself recognised this in *In re Duke of Somerset* (9).

There is no indication of intention in this will sufficient to obviate the effect of the well-established rule of construction. *Dias* v. *De Livera* (10) and *Warrington* v. *Warrington* (11) were cited to the Court of Appeal in *In re March* (12), and *Warrington* v. *Warrington* was cited in *Gordon* v. *Whieldon* (13), but nevertheless the rule was adhered to.

[He referred also to *Atcheson* v. *Atcheson* (14).]

Haycraft, in reply.

1888. June 14. KAY, J.:—

Stephen Jupp, by his will, dated the 17th of November, 1887, bequeathed a fifth share of the proceeds of real and personal property "between my sister *Mary Buckwell*, *Daniel Buckwell*, her husband, and *Harriet Buckwell*, her step-daughter, in equal parts."

(1) 14 Q. B. D. 831.
(2) 31 Ch. D. 402.
(3) 24 Ch. D. 222.
(4) 14 Q. B. D. 831, 835.
(5) 27 Ch. D. 166, 170.
(6) 19 Q. B. D. 519.
(7) 20 Q. B. D. 120.
(8) 20 Q. B. D. 635.
(9) 34 Ch. D. 465.
(10) 5 App. Cas. 123.
(11) 2 Hare, 54.
(12) 27 Ch. D. 166.
(13) 11 Beav. 170.
(14) Ibid. 485.

Unless this gift is affected by the *Married Women's Property Act*, 1882, Mr. and Mrs. *Buckwell* would take one-half, and *Harriet*, the step-daughter, the other half: *Bricker* v. *Whatley* (1); *In re Wylde* (2). In the last case, *Paine* v. *Wagner* (3), which was relied on before me, was considered as not a binding authority.

Mr. and Mrs. *Buckwell* were married before the passing of the Act. The operation of the statute upon an interest of a husband and wife held by entirety was determined by the Court of Appeal in *In re March* (4), to be that the husband would be entitled to one-half of the joint share in his own right, and the wife the other half for her separate use.

But it is argued here that as the will was made after the passing of the *Married Women's Property Act*, 1882, the rule of construction under which husband and wife take as one person one share between them has been altered, and that they now take under this will not one-half between them, *Harriet Buckwell*, the step-daughter, taking the other half, but that each of the three, the husband, wife, and the step-daughter, takes one-third.

Apart from authority, that would be an extraordinary effect of an Act of Parliament the main purpose and object of which is to give a married woman certain rights as between her and her husband, because the effect of so holding would be that both husband and wife, instead of getting one-fourth each, would get one-third each of this gift, and *Harriet Buckwell*, the step-daughter, instead of getting one-half, would only get one-third: that is, the husband would have an increased share, not only as between him and his wife, but against third parties.

If it had been the intention of the framers of the Act to alter this rule of construction I should expect to find that intention expressed. But the Act does not refer to it in any way, and so far as appears on the face of it, this would be a consequential and undesigned effect of its provisions.

The argument is that this consequence results from the 1st section, which provides that "a married woman shall, in accord-

(1) 1 Vern. 233.
(2) 2 D. M. & G. 724.
(3) 12 Sim. 184.
(4) 27 Ch. D. 166.

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ance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee;" and by sect. 5, "every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which . . . . shall accrue after the commencement of this Act."

These provisions seem to be intended to give her at law a right to any property acquired after the commencement of the Act (which was the 1st of January, 1883), equivalent to the separate use, which was a creature of equity. For the creation of that separate use a trust was required, and, as a trust never fails for want of a trustee, where no other trustee was appointed it was held that the husband should be considered as trustee for the wife. This new interest is to be without any trust a legal interest.

The reason why, if the joint estate was made to a husband and wife and to a third person, the husband and wife only took half is thus expressed by *Littleton* (1): "The cause is for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint tenants, where the one hath by force of the jointure the one moiety in law, and the other, the other moiety." *Coke*, commenting upon this (2), quotes from *Bracton*, "*vir et uxor sunt quasi unica persona, quia caro una et sanguis unus.*" Does the Act mean to alter this? Sect. 12 shews that it does not for all purposes, because it expressly preserves the inability of the wife to sue the husband in tort in certain cases.

I cite with entire approval the language of Mr. Justice *Wills* in *Butler* v. *Butler* (3), "I take the Act to mean exactly what it says—no more and no less. It is said that it destroys the doctrine of the common law by which there was what has been called a unity of person between husband and wife. Again I answer, I do not see why. It confers in certain specified cases

(1) Sect. 291. (2) 187 b.
(3) 14 Q. B. D. 835, 836.

new powers upon the wife, and in others new powers upon the husband, and gives them in certain specified cases new remedies against one another. But I see no reason for supposing that the Act does anything more than it professes to do, or either abrogates or infringes upon any existing principles or rules of law in cases to which its provisions do not apply."

That expresses perfectly my opinion as to the mode in which an Act of this kind should be construed.

The capacity of a married woman to take property is not altered as between her and the grantor. That was always complete. Whatever property, real or personal, was devised, bequeathed, conveyed, or assigned to a married woman, as between her and the grantor, passed absolutely. The Act only enlarges her capacity to take such property "as her separate property." That is, as I read it, as between her and the grantor she takes the same as before, but as between her and her husband what she takes is "her separate property." That is my construction of the statute independently of authority.

In the case of *In re March* (1), Mr. Justice *Chitty* expressed an opinion that the Act has altered the *status* of a married woman for this purpose. After reading sect. 1, sub-sect. 1, he says (2): "It appears to me that this section enlarges the capacity of a married woman. Her capacity formerly was that she could not take property which went to her husband. There were, no doubt, exceptions made in equity with regard to her right to a settlement; but here her *status* is changed, and she is made capable of acquiring personal property in the same manner as if she were a *feme sole*;" and after referring to other sections of the Act his Lordship says (3): "It appears to me that the Act makes such alterations in the relation of husband and wife that it severs that unity of person, and divides that compound person which the law formerly recognised, to such an extent as to render it wrong for the Court to apply the old principle which was founded on unity of person."

I cite these passages for the purpose of explaining the grounds on which I respectfully differ from this judgment. In my opinion,

(1) 24 Ch. D. 222. (2) 24 Ch. D. 229.
(3) 24 Ch. D. 230.

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as I have said, the capacity of a married woman to take property is only altered between herself and her husband. The true view seems to me to be that the wife had an unlimited capacity before the Act to acquire property, but that upon its acquisition the marital right of the husband gave him certain interests in it which the Act has interfered with. This seems to me to be the extent to which her *status*, if that be the right word, is intended to be altered. But for collateral purposes, that is, for any purpose in respect of property, except altering her right to property as between herself and her husband, I do not find in the Act any intimation of an intention to change her legal position. If that had been the intention I should have expected to find in the Act an express provision to the effect, for example, that in all questions relating to property the husband and wife should be considered, not only as between themselves, but also as between them and third persons, two separate individuals, and that the old law of unity of person should be abolished.

The decision in *In re March* was overruled by the Court of Appeal (1), not on this ground, but because the will in that case was made before the passing of the *Married Women's Property Act* of 1882. The learned Judges expressly declined to give any opinion what would be the effect in this respect of a will made after the Act. But Lord Justice *Cotton* (2) said this, in which I concur, "In my opinion the Act was not intended to alter any rights except those of the husband and wife *inter se*."

In this state of authority I think I am bound to decide the case according to my own opinion. I therefore hold that *Mary Buckwell* and her husband each take one-fourth, and *Harriet Buckwell* one-half, *Mary Buckwell's* share being her separate property according to the Act.

Solicitor: *H. Sowton*, agent for *J. C. Buckwell, Brighton.*

(1) 27 Ch. D. 166. (2) 27 Ch. D. 170.

C. C. M. D.

CHITTY, J.
1888
June 14, 15, 18

In re DAWSON.
JOHNSTON *v.* HILL.

[1887 D. 840.]

Will—Construction—Gift to Children of any Son of Tenant for Life—Remoteness—Tenant for Life past Child-bearing—Admissibility of Evidence.

A testator by his will, dated September, 1866, gave all his estate to trustees upon trust to pay an annuity to his daughter (the Plaintiff) for life, and on her decease he declared that they should stand possessed of the residue of the trust funds in trust for such child or children of the Plaintiff as had attained or should live to attain the age of twenty-one years, or (being a daughter or daughters) should have attained or should live to attain that age, or have married or marry, and also for such child or children of any son of the Plaintiff who should die under the age of twenty-one, as should live to attain the age of twenty-one years, or (being a daughter or daughters) should live to attain that age or marry, and, if more than one, in equal shares and proportions as between brothers and sisters.

The testator died in January, 1875, and at his death the Plaintiff, who was then over sixty years of age, had one son and five daughters living:—

Held, that the trust in favour of the grandchildren of the Plaintiff was void for remoteness, and that evidence was not admissible to shew that at the testator's death the Plaintiff was past the age of child-bearing.

Jee v. *Audley* (1) and *In re Sayer's Trusts* (2) followed.

Cooper v. *Laroche* (3) disregarded.

MAJOR DAWSON, late of *Cherry Burton*, in the county of *York*, Esq., by his will, dated the 21st of September, 1866, devised and bequeathed all his real and personal estate to trustees upon trust for sale and conversion as therein mentioned, and as to the moneys to arise from such sale and conversion upon trust, after payment of his debts, to invest the same as therein mentioned. And he declared that his trustees should out of the annual income of the trust funds pay the annual sum of £600 to his daughter, the Plaintiff, *Mary Elizabeth Johnston* (then *Mary Elizabeth Hill*), for life, and subject thereto should pay the annual income of the trust funds during the life of the Plaintiff to all her children in equal shares and proportions. And after the decease of the Plaintiff the testator declared that the trustees

(1) 1 Cox, 324. (2) Law Rep. 6 Eq. 319.
(3) 17 Ch. D. 368.

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should stand possessed of certain sums of £2500 and £7500 respectively, part of the trust funds, in trust as to the £2500 for such persons as the Plaintiff should by will appoint, and as to the £7500 in trust for the children or more remote issue of the Plaintiff as she should by will appoint, and in default of appointment with regard to both the sums that they should be considered as part of the residue. And the testator declared that the trustees should stand possessed of the residue of the trust fund and the securities for the same, and the unappointed part of the sums of £2500 and £7500 in trust for such child or children of the Plaintiff as had attained, or should live to attain the age of twenty-one years, or (being a daughter or daughters) should have attained or should live to attain that age, or have married or marry, and also for such child or children of any son of the Plaintiff who should die under the age of twenty-one years as should live to attain the age of twenty-one years, or (being a daughter or daughters) should live to attain that age or marry, and if more than one, to be divided between or among them in equal shares and proportions as between brothers and sisters, but so that the child or the children collectively of any deceased son of the Plaintiff should take only the share which such son would have taken if living, and if more than one in equal shares and proportions.

The testator died on the 7th of January, 1875, and at his death the Plaintiff, who was then over sixty years of age, had one son (the Defendant) *Major Dawson Hill* and five daughters living, all of whom had attained the age of twenty-one.

The Plaintiff claimed in this action, which was for the administration of the real and personal estate of the testator, a declaration that the trusts in the will declared to take effect after the death of the Plaintiff were void for remoteness.

The question was whether evidence was admissible to shew that at the death of the testator the Plaintiff was past childbearing.

Byrne, Q.C., and *Methold*, for the Plaintiff:—

The gift to the grandchildren of the Plaintiff is void for remoteness, and the Court cannot travel out of the will and inquire

into the age of the Plaintiff at the testator's death, so as to confine the gift to the children then living: *Jee* v. *Audley* (1); *In re Sayer's Trusts* (2); *Pearks* v. *Moseley* (3).

[They also cited *Coopér* v. *Laroche* (4).]

Romer, Q.C., and *T. L. Wilkinson*, for the Defendant, *Major Dawson Hill*:—

In construing the will you may look at the state of facts as they existed at the death of the testator, and also at the facts which were in the knowledge of the testator at the date of the will. In construing the limitation to the children and grandchildren the Court will admit evidence as to the age of the Plaintiff at the testator's death.

[They referred to *Hale* v. *Hale* (5); *Re Overhill's Trust* (6); *Lord Woodhouselee* v. *Dalrymple* (7); *Adney* v. *Greatrex* (8).]

Sir *Arthur Watson*, Q.C., and *George Henderson*, for parties in the same interest, referred to *Vanderplank* v. *King* (9); *Southern* v. *Wollaston* (10); *Williams* v. *Teale* (11); *Massey* v. *Hudson* (12); *Leng* v. *Hodges* (13); *Brown* v. *Pringle* (14); *Croxton* v. *May* (15); *In re Widdow's Trusts* (16); *Davidson* v. *Kimpton* (17); *Goodier* v. *Johnson* (18); *Garland* v. *Brown* (19).

Fielding Nalder, *F. T. Procter*, *Davenport*, *Curtis Price*, *Badcock*, *Farwell*, *Bramwell Davis*, and *Burton*, appeared for other parties who were interested in supporting the contention of the principal Defendant.

Byrne, in reply, referred to *Lord Dungannon* v. *Smith* (20); *In re Warren's Settlement* (21); *Sherratt* v. *Mountford* (22); *Coke* upon *Litt.* (23).

(1) 1 Cox, 324.
(2) Law Rep. 6 Eq. 319.
(3) 5 App. Cas. 714.
(4) 17 Ch. D. 368.
(5) 3 Ch. D. 643.
(6) 1 Sm. & Giff. 362.
(7) 2 Mer. 419.
(8) 38 L. J. (Ch.) 414.
(9) 3 Hare, 1.
(10) 16 Beav. 276.
(11) 6 Hare, 239.
(12) 2 Mer. 130.
(13) Jac. 585.
(14) 4 Hare, 124.
(15) 9 Ch. D. 388.
(16) Law Rep. 11 Eq. 408.
(17) 18 Ch. D. 213.
(18) Ibid. 441.
(19) 10 L. T. (N.S.) 292.
(20) 12 Cl. & F. 546.
(21) 52 L. J. (Ch.) 928.
(22) Law Rep. 8 Ch. 928.
(23) Vol. i. sec. 53, 40 b.

CHITTY, J. CHITTY, J.:—

1888

In re DAWSON. JOHNSTON *v.* HILL.

The question in this case is whether the trust in favour of the children and grandchildren of the testator's daughter, the Plaintiff *Mary Elizabeth Johnston*, is or is not void for remoteness.

Putting aside for a moment the question that has been argued as to the admissibility of evidence to shew that the daughter was at the time of the testator's death past child-bearing, it appears to me to be clear this trust is void. The gift is in favour of one class, but made up of two generations. The first generation is the daughter's own children. As to that no objection can be raised. The children are to take at twenty-one as to sons and as to daughters on attaining twenty-one or marriage. But the limitation in favour of the next generation, that is the daughter's grandchildren, is plainly void. The gift, to read it shortly, is for such children of any son of the daughter who should die under the age of twenty-one as shall live to attain the age of twenty-one years, or being a daughter or daughters live to attain that age or marry. Admitting the possibility of the testator's daughter having a son born after the testator's death, then I should get to a life not in being at his death: and as that child might die under twenty-one more than twenty-one years after the death of the testator that limitation to his children at twenty-one is obviously too remote.

Making the best endeavours possible to save the limitation, counsel have argued that the words "if living" in the clause which defines the shares which the grandchildren of the daughter are to take must be so construed with reference to the previous gift as to bring the clause within the rule. The argument founded on the words "if living" cannot be maintained, and I think would not even have been suggested by counsel had it not been for the purpose of avoiding the effect of the rule against perpetuities. The words are "which the son would have taken if living." Those words plainly refer to the son attaining the age of twenty-one years. It is not necessary to go further into that point. Therefore, so far, this trust is void.

Then it is argued that the Court in applying the rule against perpetuities looks at the state of things as they existed at the testator's death, and it appears that the testator's daughter at

his death was sixty years and three months old, or thereabouts; and thereupon it is said that she was past child-bearing, and consequently that there could be no son of hers born after the testator's death.

Now in support of the proposition that the Court looks at the state of things existing at the death, several cases were cited, namely, *Vanderplank* v. *King* (1), *Southern* v. *Wollaston* (2) and *Williams* v. *Teale* (3). In *Southern* v. *Wollaston*, which is the simplest of the cases, there was a gift to one for life, and after his death to divide the fund among his children who should live to attain twenty-five. Upon the reading of the will, without knowledge of the facts I am about to mention, that limitation to his unborn children or children who might be born after the death of the testator at the age of twenty-five would be obviously too remote. But the Master of the Rolls was asked to look at the state of things existing at the death, and looking at that state of things found that the tenant for life was then dead, and found further that the tenant for life had died so many years before the testator that everyone of his children must attain the age of twenty-five years within twenty-one years after the testator's death. I cite that as an illustration, and it shews that the Court will regard this circumstance of the death of a person mentioned in a will taking benefits under the will, and I mention it in the way I have done in order to dispose of the ingenious argument of Mr. *Byrne*, which was that the Court only looked to the fact of death for the purpose of ascertaining whether the tenant for life was or was not actually to take under the will. If that had been so, the inquiry would have ceased at the point of merely ascertaining the death, whereas in this case, as in the others, the Court allowed evidence to be given to shew that the death had occurred at such a period before the testator's death as allowed the Court, applying the rule against perpetuities, to say that the gift in favour of the children was valid. Those cases are not to be disturbed by me if they can be disturbed by anyone. They appear to me to be rightly decided.

Thereupon this argument is raised—that the parties are at liberty

(1) 3 Hare, 1. (2) 16 Beav. 276.
(3) 6 Hare, 239.

CHITTY, J. 1888 *In re* DAWSON. JOHNSTON *v.* HILL.

when the will is brought before the Court to give other evidence of the state of things existing at the testator's death for the purpose of shewing that some person mentioned in the will whose issue are to take can have no issue born after the testator's death. Death, of course, in the testator's lifetime proves the fact of the impossibility of having any issue born after his death, and it is said that the law cannot be so one-sided as to confine itself in point of principle to the mere case of death. It cannot be suggested, it is argued, that there is any difference between shewing the impossibility of issue by death and in any other way, and that consequently evidence is admissible to prove that a person named in the will whose issue are to take, and with regard to whose issue the question of perpetuities arises, can have no issue born after the testator's death, and consequently that in this case I ought to admit evidence to shew that the lady had attained that age at which it was impossible she could have issue. If I thought this point could be taken, and that evidence was admissible, I should require it to be proved as a fact, as any other fact must be proved to the satisfaction of the Court—that is to say, I should not assume by reading text-books on the subject that I had mastered the whole subject, and that I was in a position myself to determine such a question as this without the testimony of experts.

The question, then, is whether such evidence is admissible. The question came before Lord *Kenyon* rather more than 100 years ago, and he decided this exact point in the case of *Jee* v. *Audley* (1), It is said that it is not a decision, but a mere *dictum*. I think it can be shewn by a slight examination of the case to be a decision, and the ground of his holding that the will violated the rule against perpetuities. In that case there was a gift to the children of *John* and *Elizabeth Jee*, which was limited to take effect upon an event which was too remote according to the law as it then stood. The words used in the testator's will, which introduced this condition, were words which imported a general failure of issue. The gift, then, was to persons who could then have been ascertained, who must have come into being within lives in being, that is to say, within the lives of *John* and *Elizabeth Jee*, because

(1) 1 Cox, 324.

the limitation was to their children. But it was not a limitation to their children at birth, it was a limitation postponed as to vesting, when the case is examined, to the same point of time as that which was denoted by the indefinite failure of issue of the preceding taker. Consequently it ran thus—on the happening of an event which was too remote, I give to the unborn children of my kinsman, *John* and his wife *Elizabeth*, who were then living, not to those children at twenty-one, not to those children at birth, but to those children it might have been some fifty years after the death of the testator. The point of the case turned on the words "then living," and the Master of the Rolls said that if it had been to the daughters of *John* and *Elizabeth* living at the time of his will or the time of his own death, the gift would have been very good; but he decided the case on the ground that it was possible, in point of law, that *John* and *Elizabeth* should have children born after the testator's death. The argument was that there was no real possibility—I am using the words from the report itself—no real possibility of their having any children born after the testator's death, because they were both seventy years of age, and if the Master of the Rolls had accepted the proposition that there was no possibility of issue, then he must have decided that the gift was good. But this is what he says: After speaking of the law against perpetuities being one of the land-marks, he goes on, "It is grown reverend by age, and is not now to be broken in upon; I am desired to do in this case something which I do not feel myself at liberty to do, namely, to suppose it impossible for persons in so advanced an age as *John* and *Elizabeth Jee* to have children; but if this can be done in one case, it can be done in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture." It is clear that Lord *Kenyon* was considering the case generally, and it is clear that if he had admitted the evidence in this case, or admitted any argument with regard to the impossibility of issue, it would have followed that he must, and that the Court must, in every other case make an inquiry into the possibility of issue other than that which arises from death. As I pointed out in the argument, if medical testimony was admitted in this case for the purpose of shewing

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that the lady was past child-bearing, it would equally be admitted as a matter of law in the case of a woman of younger age, and it may be medical testimony could shew that she was incapable of bearing a child, and evidence of that class might, therefore, consistently with the supposed principle, be adduced in the case of a woman of thirty or even younger: and if the principle is pursued in this way, there could be no ground for rejecting evidence in the case of a man. It is unnecessary to pursue that. Of course the probability is not great, but there are cases, I take it, in which it could be proved that it was impossible for a man to have children. The Master of the Rolls appears to me to have deliberately rejected this argument on grounds which appeared to him to be sufficient, and he speaks of the danger of the experiment and the great inconvenience and the latitude which would be introduced into the law. That is a decision pronounced, as I have said, more than a century ago, and it is cited in the text-books without any adverse comment. It has also been mentioned by several eminent Judges since, and with approval. It may be that sometimes rhetorical phrases are applied even by eminent Judges to propositions of law. In *Lord Dungannon* v. *Smith* (1) Lord *Brougham* in eloquent language described it as "one of the corner stones of the law," and I understand the Lord Chancellor in the same case to have considered the decision in *Jee* v. *Audley* (2) to be one of the land-marks.

Now, seeing that that case has never been over-ruled, it would be beyond my authority to touch it. I must accept it right or wrong. It has, however, been followed by Vice-Chancellor *Malins* in *In re Sayer's Trusts* (3). There he held, after *Jee* v. *Audley* had been cited to him, that "evidence that at the date of the will the married woman was past the age of child-bearing was not admissible for the purpose of shewing that children then living were meant, so as to make valid the gift over, which otherwise was void for remoteness." If this had been the first decision on the subject, I might have been required to examine some of the grounds on which the learned Vice-Chancellor, according to the report, proceeds. I think I am not called upon to do it. The

(1) 12 Cl. & F. 631. (2) 1 Cox, 324.
(3) Law Rep. 6 Eq. 319.

substance of his decision is that he adopted the principle of *Jee* v. *Audley* (1) and followed it.

Then it is said that the Vice-Chancellor subsequently departed from that decision in *Cooper* v. *Laroche* (2). *Jee* v. *Audley* was not cited to him, nor was *In re Sayer's Trusts* (3). The point certainly did arise in *Cooper* v. *Laroche*. At the end of the argument, according to the report, counsel seems to have sprung this point upon the Vice-Chancellor, and, *Jee* v. *Audley* and *In re Sayer's Trusts* not being cited, he certainly did hold that he could have regard to the age of the lady and conclude that she was past child-bearing and therefore upheld the gift. He says (4): "With regard to the other legatee, although she was tenant for life with remainder to all her children, I am informed, and all the counsel agree, that she was at an age past child-bearing, namely, sixty years of age." So that the counsel who started this point upon the Court appears to have taken the Vice-Chancellor, if I may say so, by surprise, and also his learned brethren in Court. The matter had not been considered, and, as far as the Vice-Chancellor's two judgments are concerned, I think that his decision in *In re Sayer's Trusts* must be taken to be the more deliberate, and the one at any rate which, being in conformity with *Jee* v. *Audley*, I ought to follow.

Very curiously there is authority apart from *Jee* v. *Audley* which appears to me to have a bearing on this point with reference to the age of a woman and the possibility of her having issue. *Littleton*, in stating the law of dower, says (5): "And also in every case where a women taketh a husband seised of such an estate in tenements, &c.: so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower, and otherwise not." Where the husband is tenant in fee simple he means, of course, the issue of him and his wife would succeed to the inheritance as heir. Where the case however, is that he holds by some special limitation in tail, so

(1) 1 Cox, 324.
(2) 17 Ch. D. 368.
(3) Law Rep. 6 Eq. 319.
(4) 17 Ch. D. 373.
(5) Coke upon Litt. vol. i. s. 53.

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that the issue of the particular wife by him could not succeed to the inheritance, in that case the wife shall have no dower. Now his term is "possibility," upon which there is a very learned commentary by Lord *Coke* (1): "Albeit the wife be a hundred years old," that is the first thing. Then he speaks of the age of the husband—"or that the husband at his death was but four or seven years old, so as she had no possibility to have issue by him, yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband, she shall be endowed, and that women in ancient times have had children at that age, whereunto no woman doth now attain, the law cannot judge that impossible which by nature was possible. And in my time a woman above threescore years old hath had a child;" and then he adds "*ideo non definitur in jure*," by which I understand him to mean that no legal proposition can be founded on the impossibility of issue. The rest I need not read. That is cited, and I think fairly and properly cited, in support of Lord *Kenyon's* decision. However, as I have said, I think I am bound by Lord *Kenyon's* decision.

Another argument was adduced with reference to what appears to be the practice of the Court of Chancery in former times and of the Chancery Division of the High Court in the present day with reference to payment out where there is a married woman whose children are to take and the lady has attained a certain age. Those are cases I think, when examined from the beginning down to the present time, in which the Court does not assume the impossibility of issue, but as a mere matter of convenience of administration regards the high degree of improbability, and it has come now to be fixed somewhere about the age of fifty-four, although the circumstances may still be inquired into. But with regard to the rule against perpetuities a high degree of probability or improbability will not do. The rule with regard to perpetuities is that the limitation must be such that every member of the class, where it is a question of a class gift, must of necessity take within the time allowed. Otherwise many and many a case it will be seen could be supported if the rule of a high degree of improbability were applied. The practice of the Court at one time, say about the first quarter of this century, was to require

(1) 40 b.

security, and that went on for some time afterwards, and in the case of *Leng* v. *Hodges* (1), mentioned by Sir *Arthur Watson*, money was paid out on the assumption that the lady, who was sixty-nine years of age, would not have any issue, but security was taken. Subsequently, in 1845, I think security was taken, and the lady's age was sixty-four. But after a time the Court has thought it might dispense with security and act upon so high a degree of improbability that it did not require, as was once the practice, an undertaking—even sometimes the undertaking of the married lady—to refund. I take it, if there were children afterwards born, they would still be in a position, notwithstanding the order, to claim what had been unjustly taken from them. I mention those cases in order to state my opinion that they have not established the principle of the impossibility of the lady having issue. They are only illustrations of a convenient rule of practice in the administration of justice.

Solicitors: *Hopgood, Foster, & Dowson; Monckton, Long, & Gardiner; Blewitt & Tyler; A. R. & H. Steele; Rollit & Sons.*

G. M.

WYMAN *v.* KNIGHT.

[1888 W. 2153.]

Practice—Writ of Assistance—Rules of Supreme Court, 1883, *Orders* XLVII., XLVIII.

Although for the purpose of recovering land the old writ of assistance has been superseded by the writ of possession (Order XLVII.) the writ may still be issued for the purpose of recovering possession of and preserving chattels which have been ordered to be delivered to a receiver.

MOTION.

In this case an order had been made on the 4th of July, 1888, for the appointment of a receiver of chattels in the custody and possession of the Defendants, who were trustees; one of them being out of the jurisdiction in *Constantinople*, while the other, the solicitor of the trust who had the trust deeds and documents

(1) Jac. 585.

CHITTY, J. 1888 WYMAN v. KNIGHT.

in his custody and possession, had absconded. The key of the safe in which the trust deeds were deposited was in the possession of the defaulting trustee's clerk, but he declined to give up the deeds to the Plaintiff, who, being unable to obtain the deeds, now moved for a writ of assistance.

Whinney, in support of the application:—

It will be impossible for the Plaintiff to obtain the deeds without the aid of the Court by writ of assistance. No doubt the effect of Order XLVII. (Rules of Supreme Court, 1875, Order XLVIII.), appears to be to substitute the writ of possession for the writ of assistance: *Hall* v. *Hall* (1); but the writ of possession applies to land only. The writ of delivery under the existing Order XLVIII. for the purpose of enforcing a judgment or order "for the recovery of any property other than land or money" only provides for distraint by the sheriff, and not for a specific delivery of the chattels sought to be recovered.

With respect to the recovery and possession of chattels there appears to be a *casus omissus* in the Rules, and therefore (as provided by Order LXXII., rule 2), the old practice would remain. In similar circumstances Vice-Chancellor *Malins*, after some hesitation, directed the writ of assistance to issue: *Cazet de la Borde* v. *Othon* (2).

CHITTY, J. (after stating the facts, proceeded):—

In these circumstances the Plaintiff cannot issue a writ against the solicitor because he has escaped, and the result is that the deeds and documents will remain in peril unless some remedial writ can be obtained. Now Order XLVII. (Rules of Supreme Court, 1883), deals with the writ of possession, but when the terms of the order are looked at, it will be seen that the writ referred to in Order XLVII. applies to land only. The new writ constituted by that Order has superseded the writ of assistance, so far as lands are concerned, and I think that was also the opinion of the late Master of the Rolls in the case he had before him (*In re Holden*, 7th May, 1878 (3)). Anyhow I hold that to be the

(1) 47 L. J. (Ch.) 680. (2) 23 W. R. 110.
(3) Seton, 4th ed., p. 1562.

result of Order XLVII. in my view. Order XLVIII. relates to chattels only, but that order is not applicable to the exigencies of the present case. I have caused inquiries to be made at the Central Office, and I find that a writ of assistance, if properly framed, would have been issued so as to apply to chattels. In *Cazet de la Borde* v. *Othon* (1) Vice-Chancellor *Malins* allowed such a writ to issue. There is therefore a clear decision in favour of my acceding to this application. Following that decision, and after consulting with the officers of the Court, I am of opinion that the writ ought to go. The Registrar will draw the order and issue the proper writ applicable to the circumstances of the case.

MINUTES OF ORDER:—Injunction restraining the Defendants until judgment in the action or further order from disposing of, dealing with, or parting with the possession of the securities and documents of title and other documents belonging to or connected with the trusts of the several indentures of settlement otherwise than to the receiver; continue the *interim* receiver appointed by the order of the 4th of July, 1888, and let such order be extended so as to include the income of the trust funds subject to the indentures (of settlement); and let such order, so far as the same directs the delivery by Defendants to the receiver of the securities and other documents and papers belonging to or connected with the trusts of the said indenture of settlement, be extended so as to include the delivery over to the receiver of the said indentures dated respectively, &c., &c. And it appearing by the said affidavits of &c. that the Defendants have not delivered over to the receiver the securities, documents of title, and other documents and papers belonging to or connected with the trusts of the said indenture pursuant to the said order. And it appearing by the affidavits, &c., &c., that the same are locked up in a safe at the office of the Defendant [*the absconding solicitor trustee*], situate at ——, and that it is impossible for the receiver to get possession of the said securities and documents without the assistance of this Court; Let a writ of assistance issue directed to the Sheriff of *London* to put the receiver in possession of the premises in question pursuant to the said order dated the 4th of July, 1888, and of this order.

Solicitors: *Lyne & Holman.*

(1) 23 W. R. 110.

F. G. A. W.

NORTH, J.
1888
June 16.

In re EARL OF WINCHILSEA'S POLICY TRUSTS.

Policy of Life Insurance—Payment of Premiums by Person not beneficial Owner—Trustee—Indemnity—Lien—Salvage.

Under the provisions of a private estate Act the trustee of a term of years in certain settled estates, of which *W.* had been tenant for life, was bound to apply the rents of the estates, first, in the payment from time to time of the interest upon certain incumbrances existing before the passing of the Act, and subject thereto in the payment from time to time of the interest on sums to be raised by *W.* by mortgages created under the powers conferred by the Act, and of the premiums on policies of life assurance, constituting the collateral security for the repayment of those sums, the equity of redemption being reserved to *W.* The rents having become insufficient, the trustee, in order to save one of the policies from lapsing, paid a premium out of his own moneys. He did this without any request from the mortgagee or from the owner of the equity of redemption of the policy. The life insured having dropped, and the proceeds of the policy having been received by the mortgagee:—

Held, that the trustee was not entitled to any lien on the proceeds in respect of the premiums which he had paid, he not being a trustee of the policy.

The right of a trustee to be indemnified out of his trust fund for money expended by him in its preservation, is strictly limited to the trust fund.

In re Leslie (1) explained.

PETITION by the Duke of *Richmond* asking that a sum of £2258 0*s.* 4*d.*, which had been paid into Court under the *Trustee Relief Act*, might be paid out to him.

By virtue of an indenture of settlement, dated the 8th of May, 1843, and another indenture of settlement, dated the 5th of August, 1846, and the will of the 10th Earl of *Winchilsea*, certain estates became on the death of the 10th Earl limited to the use of the Duke of *Richmond* and *Christopher Turnour*, their executors, administrators, and assigns, for the term of 100 years, commencing from the death of the 10th Earl of *Winchilsea*, if the 11th Earl should so long live, upon certain trusts for payment, after the death of the 10th Earl, of the rents and profits of the settled estates to the 11th Earl, until he should assign or charge the said estates or the said rents and profits, or should do or suffer to be done anything whereby the estates or the

(1) 23 Ch. D. 552.

rents and profits, if vested in or payable to himself, would by operation of law or otherwise become vested in or payable to some other person or persons; and, after the determination of the said trust, upon certain discretionary trusts therein declared for the benefit of the 11th Earl and his then or any future wife, and his children by every or any wife, or any of them. The 10th Earl died on the 8th of January, 1858. In the year 1865, the "Earl of *Winchilsea's Estate Act*, 1865" (28 & 29 Vict. c. 2), was passed. By sect. 3 of this Act it was enacted that the 11th Earl, from time to time, with the consent of the trustees, might raise for the purposes of the Act, on the security during the life of the Earl of all or any part of the settled estates comprised in the 100 years term, and, if and so far as might be found requisite, with the collateral security of any assurances on the life of the Earl, any sums not exceeding in the whole £50,000, besides the expenses of raising and securing the same, and in order to secure the repayment of the principal sums so raised, with interest, and the moneys from time to time payable for effecting and keeping on foot the assurances, the Earl, with the like consent, might mortgage for his life the settled estates, or any part thereof, to the persons advancing the principal sums, and the mortgages should be paramount to the term, and might contain such powers of sale and other powers and provisions as the Earl, with the like consent, should think fit. Sect. 9 provided that the principal moneys from time to time raised under the Act should be applied by the Earl, with the concurrence of the trustees, for certain specified purposes and not otherwise. Sect. 10 provided that "from and after the passing of this Act the trustees may and shall make such provision as they from time to time think proper for the due application during the life of the now Earl of a sufficient part of the rents and profits of the settled estates for the following purposes; (that is to say,) first, for the payment from time to time, when and as the same shall fall due, of such of the yearly sums, and the interest on such of the other charges and incumbrances, respectively specified in the second schedule to this Act annexed, as are from time to time subsisting; and subject thereto, secondly, for the payment of the expenses of and incident to the execution of this Act by the trustees and the now Earl; and,

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subject thereto, thirdly, for the payment from time to time, when and as the same become due, of the interest on the principal sums raised by the now Earl, with the consent of the trustees under this Act, and of the sums requisite for effecting and keeping on foot the assurances constituting the collateral security for the repayment of the principal sums so raised"; and, subject thereto, fourthly and fifthly, for other purposes which it is not necessary to state. Sect. 11 provided that, subject to the provisions of the Act, the rents and profits of the settled estates from time to time after the passing of the Act falling due during the life of the Earl should be applied and disposed of by the trustee for the maintenance, support, subsistence, advantage, and benefit of all and every, or any one or more exclusively, of the Earl, and his then present or any future wife, and his children and issue by every or any wife, in manner therein mentioned.

In December, 1865, the 11th Earl, under the powers conferred on him by the Act, and with the consent of the trustees of the term of 100 years, raised the sum of £50,000 by a mortgage to the *North British and Mercantile Insurance Company* of part of the settled estates, and of two policies of insurance, respectively for the sums of £7000 and £48,000, at the respective annual premiums of £333 19*s.* 2*d.* and £2290, upon the life of the 11th Earl. The equity of redemption of the policies was reserved to the 11th Earl.

Shortly after the passing of the Act the Duke of *Richmond* and *Christopher Turnour* entered into the receipt of the rents and profits of the settled estates, and thereout, so far as the same would extend, from time to time paid and provided for the interest on the charges affecting the estates, and also the premiums on the policies.

On the 8th of October, 1870, the 11th Earl was adjudicated a bankrupt. In 1875 the mortgage debt of £50,000, together with the benefit of all securities for the same, including the two policies of insurance on the life of the 11th Earl, became vested in, and the policies were assigned to, Sir *Arnold W. White* and three other persons, subject to the equity of redemption then subsisting therein.

In March, 1886, *Christopher Turnour* died. On the 9th of June,

1887, the 11th Earl died. In September, 1887, the mortgagees received from the insurance company the sum of £55,000, the amount of the two policies, and, after retaining thereout the amount due to them upon their security, there remained in their hands a surplus of £2278 18*s.* 6*d.*, and this sum (less the costs of payment into Court) was represented by the sum in Court.

The petition stated that on the 22nd of December, 1886, a premium of £2290 fell due in respect of the policy for £48,000; that the Duke had not then, and had no prospect of having, and had not in fact ever had, any trust funds in hand applicable for the payment thereof; that the net rental of the trust estates was in the year 1886 insufficient to keep down the interest on the charges on the estates, and to pay the premiums on the policies; that, in order to save the policy for £48,000, the Duke on the 20th of January, 1887, borrowed from his bankers £2290, and therewith paid the said premium; that no part of the said sum or any interest thereon had ever been repaid to him, and that he was still indebted to his bankers for the said sum with interest thereon. If the Duke had not paid the premium the policy for £48,000 would have lapsed. The petition did not allege that the Duke had paid the premium at the request of either the mortgagees or the trustee in the bankruptcy of the Earl.

The trustee in the bankruptcy claimed the money in Court.

The petition asked that the sum of £2258 0*s.* 4*d.* in Court might be paid to the Duke.

Crackanthorpe, Q.C., and *Farwell*, for the Petitioner:—

The Duke in his character of a trustee is entitled to a lien on the proceeds of the policy for the premium which he paid to preserve it. If he had not paid the premium the policy would have lapsed, and then the mortgagees would have lost it, and there would have been nothing for the trustee in the bankruptcy. The Earl was personally liable to pay the £50,000. The payment was not made voluntarily by a mere stranger: *In re Leslie* (1); *Falcke* v. *Scottish Imperial Insurance Company* (2). In *In re Leslie* (3) Lord Justice *Fry* said, "In my opinion a

(1) 23 Ch. D. 552.
(2) 34 Ch. D. 234.
(3) 23 Ch. D. 560.

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lien may be created upon the moneys secured by a policy by payment of premiums in the following cases." The second of the four cases which he mentioned was, "By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation." The Duke is a trustee of the 100 years' term, and the private Act imposed on him the duty of paying out of the rents of the property the premiums necessary to keep up the policy. He was not a mere stranger, but was a trustee with a statutory duty, and he is therefore entitled to indemnity. He had no fund available for payment of the premium, and he could not perform his statutory duty except by paying the premium out of his own money: *Clack* v. *Holland* (1). The test is whether, as Lord Justice *Bowen* said in *Falcke* v. *Scottish Imperial Insurance Company* (2), there was an implied request to pay the premium, and an implied contract to repay it. The private Act made the Duke a trustee for the mortgagees, or at any rate imposed on him the duty of preserving the policy for them. In order to entitle him to the lien which he claims, it is not essential that the policy should have been vested in him. There may be other cases than those mentioned in *In re Leslie* (3) in which there is a lien for money paid to keep up a policy.

Cozens-Hardy, Q.C., and *H. Terrell*, for the trustee in the bankruptcy, were not called on.

Hornell, for the mortgagees.

NORTH, J.:—

I should be glad if I could see my way to make the order which is asked, but I do not. The law on the subject has been laid down clearly, and I am bound to follow it. The principles enunciated by Lord Justice *Fry* in *In re Leslie* were in substance adopted by the Court of Appeal in *Falcke* v. *Scottish Imperial Insurance Company* (4), and I think the Court intended to lay down exhaustively all the cases in which a person, not the

(1) 19 Beav. 262, 276.
(2) 34 Ch. D. 249.
(3) 23 Ch. D. 552.
(4) 34 Ch. D. 234.

sole beneficial owner of a policy, who pays a premium in respect of it, is entitled to a lien upon the proceeds of the policy for the amount which he has paid. Mr. *Crackanthorpe* has argued that the Duke comes within the second class mentioned by Lord Justice *Fry* in *In re Leslie* (1)—the right of a trustee to an indemnity out of his trust fund for money expended by him in its preservation. The Duke, as it was his duty to do, has applied the rents of the property in paying the premiums on the policy, but the rents proved insufficient, and he put his hand into his own pocket to make up the deficiency. I think he does not come within the second class mentioned by Lord Justice *Fry*, for, in my opinion, the right of a trustee to an indemnity is confined to indemnity out of his trust fund. The duty of the Duke in relation to the rents has been fully performed. He has no trust and no duty in respect of the policy moneys. Those moneys are not trust moneys, and I do not see how he can have any right to a lien upon them for money expended by him in their preservation. I think that Lord Justice *Fry* intended in *In re Leslie* to lay down exhaustively the cases in which a person who pays a premium in respect of a policy of insurance will be entitled to a lien upon the proceeds of the policy, and that he meant to say that a trustee would not be entitled to a lien in any other case than that which he mentioned.

I hold, therefore, that the Duke is not entitled to any lien, and I must order the fund in Court to be paid to the trustee in the bankruptcy.

Solicitors for Petitioner: *Burch, Whitehead, & Davidson.*
Solicitors for Trustee in the bankruptcy: *Lumley & Lumley.*
Solicitors for Mortgagees: *Arnold & Henry White.*

(1) 23 Ch. D. 552.

W. L. C.

NORTH, J.
1888
June 27.

In re LORD CHURCHILL.
MANISTY *v.* CHURCHILL.

[1887 C. 2574.]

Principal and Surety—Crown Debts—Administration—Priority.

A surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of his principal's estate.

THIS was a creditor's action for the administration of the estate of the late *Francis George* Baron *Churchill*.

The estate was insolvent.

A claim was made by the executors of *Francis Nathaniel* Marquis *Conyngham* to rank in place of the Crown in priority to the other creditors, as creditors for a sum of £5171 13*s.* 9*d.* they had been called upon to pay to the Crown, under a bond given to the Crown by the Marquis *Conyngham* as surety for Lord *Churchill*.

Francis George Baron *Churchill* executed a bond dated the 8th of July, 1875, to secure the payment to the Crown of a sum of £7083 4*s.* 5*d.* and interest by half-yearly payments of £500 on the 1st of May and the 1st of November in each year. *Francis Nathaniel* Marquis *Conyngham* executed a bond of the same date to secure to the Crown payment of any balance which should remain unpaid at the death of Lord *Churchill* on his bond.

Francis Nathaniel Marquis *Conyngham* died in July, 1876. Lord *Churchill* paid all instalments due under his bond to the Crown up to the 1st of May, 1879; he died in November, 1886, without having made any further payment. The executors of the Marquis *Conyngham* were called upon to pay, and did pay, on the 5th of January 1887, to the Crown a sum of £3933 19*s.* 7*d.* in respect of principal, and £1237 14*s.* 2*d.* in respect of interest due from the estate of Lord *Churchill* under his bond.

The question whether the sureties were entitled to the same priority that the Crown would have had was now argued in Court between the Claimants and the Plaintiffs.

Cozens-Hardy, Q.C., and *W. F. Hamilton*, for the Claimants:—

It cannot be said that the rules applicable in bankruptcy were introduced into the administration of an insolvent estate by s. 10 of the *Judicature Act*, 1875, so as to affect the question now before the Court: *In re Oriental Bank Corporation* (1); *Thomas* v. *Patent Lionite Company* (2); *In re Maggi* (3); *In re M'Myn* (4); *In re Williams* (5).

On general principle, acknowledged both at law and in equity, a surety is entitled to all the remedies the creditor would have had—to stand, as it was sometimes put, in the shoes of the creditor whose debt he has paid. There is express authority that a surety to the Crown who has paid the Crown is entitled to the priority which the Crown had: *The King* v. *Bennett* (6), and cases referred to in the notes.

In re M'Myn is also an authority on this point. Even if on general principle the claimants are not entitled to priority by reason of any technical defect in their not being able to stand in the position of the Crown or otherwise, the 5th section of the *Mercantile Law Amendment Act*, 1856, cures that defect and gives the surety all the rights and remedies the creditor, whether the Crown or a subject, would have had.

Crackanthorpe, Q.C., and *Methold*, for the Plaintiffs:—

After the decision of *In re Williams* we will not contend in this Court that s. 10 of the *Judicature Act*, 1875, affects the question.

The right of the Crown to priority is a prerogative right which cannot be delegated to a subject except under Act of Parliament. *Magna Charta* (9 Hen. 3, c. 8) did give the surety to the Crown who has paid a Crown debt the right which the Crown had to proceed against the head of the principal debtor, and that is all that the case of *The King* v. *Bennett* and the cases there referred to decide.

The *Mercantile Law Amendment Act*, sect. 5, was passed to remedy

(1) 28 Ch. D. 643, 649.
(2) 17 Ch. D. 250.
(3) 20 Ch. D. 545.
(4) 33 Ch. D. 575.
(5) 36 Ch. D. 573, 582.
(6) Wight. 1.

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the mischief of a particular decision, *Copis* v. *Middleton* (1), and to meet the case of a judgment being satisfied by the payment of a debt. It was not aimed at Crown debts, the Crown is not mentioned in the statute, and on ordinary principles of interpretation the statute does not apply.

NORTH, J.:—

I think the claim is well founded. The right of the Crown against the estate is to obtain payment of a debt in respect of which it has a right to be paid in preference to the other creditors. In this case the surety, who has paid, is entitled to stand in the place of the creditor whose debt is paid. There used to be in some cases a technical difficulty that prevented the surety from obtaining all the remedies the creditor would have had. That difficulty was got over by the *Mercantile Law Amendment Act*, 1856, which provides that "every person who, being surety for the debt . . . of another, . . . shall pay such debt, . . . shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt, . . . whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt; . . . and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor . . . indemnification for the advances made and loss sustained by the person who shall have so paid such debt." In the present case a surety has paid, and is entitled, I think, independently of the Act (to use the words of the Act), "to stand in the place of the creditor, and to use all the remedies," to recover what the Crown could have recovered from the principal debtor. What the Crown could have recovered was payment of the debt in priority of the other creditors, and the surety is now entitled to that priority. The case of *In re M'Myn* (2), if authority were wanted, was one on principle very

(1) T. & R. 224. (2) 33 Ch. D. 575.

like the present. In that case it was held that the surety who had paid a judgment creditor was entitled to the same priority that the creditor would have had. It seems to me immaterial in what way he got the priority. Under these circumstances I think the surety is entitled to succeed.

Solicitors for the Claimants: *Benbow, Saltwell, & Tryon.*
Solicitors for the Plaintiffs: *Walters, Deverell, Walters, & Wood*

D. P.

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June 1, 4.

DOOBY *v.* WATSON.

[1886 D. 1750.]

Solicitor—Trustee—Mortgage—Negligence—Statute of Limitations.

A mortgage was made through a solicitor and proved to be an insufficient security. More than six years afterwards an action was brought by the client against the executor of the solicitor claiming damages as for the wilful default of the solicitor:—

Held, on the facts, that the client had approved of the mortgage, and that the solicitor merely did the legal part of the business and was not in the position of trustee, and therefore that the *Statutes of Limitation* applied.

A solicitor in advancing money on mortgage may be employed, (1) to invest in a particular mortgage; (2) to find securities to be approved by the client and then invest the money; (3) to find securities and invest the money, the client taking little or no part in the business. In an action for negligence against the solicitors, the *Statute of Limitations* is a good defence in the first case and also in the second case if the client has approved of the mortgage, no relation of trustee and *cestui que trust* then existing between them.

Mare v. *Lewis* (1) observed upon.

IN 1877 Mrs. *Dooby*, widow, through her solicitor, Mr. *William Watson*, sold an estate for £10,000, of which £5000 remained in the hands of *W. Watson*, and was invested through him on a mortgage of lands belonging to *W. Marsdin*. The lands were afterwards found to be an insufficient security and in 1886 Mrs. *Dooby* brought this action against *J. Watson*, the executor of *William Watson*, who died in the year 1879, and against *W. Marsdin*, claiming as against the executor an account on the footing of wilful default, by *W. Watson*, and a declaration that the executor was liable to make good the deficiency; and as against *W. Marsdin* an account and sale and payment.

The executor denied that there had been any negligence or default by *W. Watson*, and alleged that at the time of the mortgage Mrs. *Dooby* was informed by *W. Watson* of all the material facts, and the executor claimed the benefit of all the *Statutes of Limitation* applicable to the case.

The facts are fully stated in the judgment.

(1) I. R. 4 Eq. 219.

This was the trial of the action.

Seward Brice, Q.C. and *Butcher*, for Mrs. *Dooby*:—

Mr. *William Watson* undertook the duty of finding this mortgage for Mrs. *Dooby* and did not merely perform the legal part of the business. He therefore placed himself in a fiduciary position towards her and the statute does not apply: *Craig* v *Watson* (1); *Smith* v. *Pococke* (2); *Burdick* v. *Garrick* (3); *Banner* v. *Berridge* (4).

Mrs. *Dooby* and *J. Watson*, the executor, were examined, and the diary of the late *W. Watson* and other documents were produced as evidence.

Warmington, Q.C., and *Warrington*, for the executor:—

This is a purely legal demand on the ground of negligence, to which the *Statute of Limitations* is a bar. There is no case of trust made out beyond the ordinary trust which must be placed in a solicitor. The money was not left in his hands generally for investment as he pleased, but was invested in this particular mortgage with the full knowledge and approval of the Plaintiff: *Mare* v. *Lewis* (5). In *Craig* v. *Watson* there was a declaration of trust. In *Smith* v. *Pococke* the conduct of the solicitor was fraudulent. In *Burdick* v. *Garrick* there was a clear relationship of trustee and *cestui que trust*. *Watson* v. *Woodman* (6) shews that the mere receipt of money does not constitute a trustee.

Seward Brice, in reply:—

There is no magic in words, and the word "trustee" need not be used to constitute the relationship: *British Mutual Investment Company* v. *Cobbold* (7). It is clear that Mr. *Watson* acted as Mrs. *Dooby's* agent in this business and not merely as a solicitor doing legal business. He was bound to ascertain the facts and give her full information. In *Mare* v. *Lewis* the Court found as a fact that the defendant did not undertake the liability.

(1) 8 Beav. 427.
(2) 2 Drew. 197.
(3) Law Rep. 5 Ch. 233.
(4) 18 Ch. D. 254.
(5) I. R. 4 Eq. 219.
(6) Law Rep. 20 Eq. 721.
(7) Law Rep. 19 Eq. 627.

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KEKEWICH, J.:—

This case promised to be more fruitful of decision on legal points than, so far as I am concerned, it is likely to be, and it promised also to cause considerable difficulty on questions of fact. It has occupied a long time—not one moment longer, I think, than the importance of the case deserved—because it is a case of large importance to the parties concerned, and also raises a question of considerable importance to practising solicitors and to those who consult them.

One fact is admitted on both sides to be the foundation of the whole case, namely, that in 1877 Mrs. *Dooby*, the Plaintiff, employed the firm of Messrs. *Watson & Sons*, or more strictly (though not technically more correctly), Mr. *William Watson*, the senior partner of the firm, as her solicitor, to sell her *Gaustead* estate and to invest the proceeds of sale. About that there is no doubt at all. Mr. *Watson* did sell the estate, that is to say, he did the solicitor's business. He received the purchase-money, and he dealt with the purchase-money in two parts, no question arising about one part, and the question in this case arising about the other part, which was a sum of £5000.

The £5000 in question was invested on a mortgage of property belonging to *W. Marsdin*, and for the purpose of that investment, as also for the purposes of the sale, and for other purposes in which Mrs. *Dooby* consulted Mr. *Watson*, she placed the utmost confidence in him—that confidence which most clients, whether male or female, place in the solicitors whom they are in the habit of consulting, and on whose legal knowledge and general experience they rely. The money was invested on this mortgage, which has turned out to be an insufficient security at the present time. If the confidence was misplaced, if unfortunately the business was not well done, if Mr. *Watson* did not bring to bear reasonable skill and diligence, if he neglected those precautions which a solicitor ought to observe, or more, if he did not manage to acquire the knowledge of what he might be presumed to know for the sake of his client, he was liable in an action for negligence by his client. But all those events took place many years ago, more than six years before the commencement of the action; and an action of that kind is barred by statute. If any

excuse were wanted for the policy of such a statute—which certainly it is not my business to find—it would be found in a case like this, where nothing could be worse in the interests *rei publicæ* than that matters of negligence could be dug up after one of the principal actors is dead, and when it is extremely difficult to ascertain the real facts. As an action of negligence it falls to the ground, and that is really conceded by the Plaintiff. But what she says is that there are in this case those peculiar circumstances which, to use the common phrase, "take the case out of the statute." Her counsel hesitate to use the word "fraud," but they in fact impute it, and they base the exclusion of the statute on the ground of fraud, arguing that the statute cannot be called in aid unless the Defendant can shew that six years have passed since the mischief was discovered, or rather since reasonable means of discovering the mischief were in possession of the Plaintiff. As according to their view and to her statement, Mrs. *Dooby* never really knew what had been done, and never knew the improper way in which her business had been conducted, until she consulted her present solicitor not long before the commencement of the present action, the six years had not then run and therefore the *Statute of Limitations* does not apply.

If these circumstances exist at all, they are useful to the Plaintiff as a ground for relief of an entirely different character, and as constituting that relation of trustee and *cestui que trust* which would entitle her to relief independently of negligence. Putting negligence altogether out of the question, and therefore without pausing to consider whether the circumstances could in any way in a case of this kind be considered to exclude the operation of the statute, I only revert to them with reference to the much more important question whether there was the relation of trustee and *cestui que trust*, which if it existed would exclude the operation of the statute.

This, then, is the real question which I have to consider. That there was in one sense a trust is true enough. There is a trust in almost every relation of life in which one person does something for another. Those who deal, as the Vice-Chancellor of *Ireland* suggests, with a broker, trust him to make a selection of certain securities. In a broader sense, and one frequently used,

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we are all trustees, some for the public, some for different sections of the public, of our abilities, our time, our goods, and so on. But in Courts of Equity, and in the text-books and authorities, trustee and *cestui que trust* have a technical and defined meaning. First, you must have a person who is trustee, then you must have property, which may be chattels, or land, or money, or anything, and you must have persons who are the *cestuis que trust*—in trust for whom that property is held by the person who is the trustee. That combination must exist before you get the relation of trustee and *cestui que trust* such as is set up here.

I have, therefore, to examine the relations between Mrs. *Dooby* and Mr. *Watson* in the year 1877; but before I consider the broad facts, let me say how I regard the position which a solicitor occupies with reference to money entrusted to him for investment. I put aside those cases, which apparently are not common now, if ever they were, where the solicitor is intending to make a profit if he can, and in fact acts thoroughly as a money scrivener—where he insures the money of his clients, and so long as he fulfils that insurance, and pays the specified interest, is entitled to do the best he can for himself. A solicitor cannot under any circumstances *quâ* solicitor make a bargain of that kind with his client or act in that way. I apprehend, then, that the cases in which a solicitor acts in his proper character may be divided into three classes, all of common occurrence. In the first case a solicitor receives a certain sum of money in order to invest it in a particular mortgage. His client, either on his own selection, or on the advice of the solicitor, has determined to invest a particular sum on a particular mortgage, and all the solicitor does is the legal business, receiving the money and seeing, when the proper time arrives, that the deeds are executed and the money handed over to the mortgagor. His duty in that case is simple but important, and large sums very often pass in that way. In the second case the solicitor receives money in order that he may himself find mortgages to be approved by the client. He retains the money in the meantime. He from time to time reports to his client what mortgages he has found. I use the word "mortgages" only, but of course it is applicable to other investments. He does whatever business is necessary—advises his client as to the

precautions to be taken, and ultimately sees the money handed over either as a whole or in parts to the mortgagee or mortgagees. Beyond that there is a third case, equally common but distinct from the others, where the solicitor does far more than he does even in the second class—that is to say where the client, for some reason, takes little part, perhaps no part at all, in the investment. He may be abroad, as one of the cases cited here shews, the solicitor acting under a power of attorney. All the client then requires is to know that the money has been invested, and that the interest will be payable and be paid. In that case the solicitor has an onerous duty to perform, because, beyond providing the mortgages, beyond doing the mere legal business, he really undertakes the responsibility to his client of seeing that they are good mortgages, on which the money may be safely invested. That is within the ordinary duty of solicitors according to the practice of the profession, and is a more onerous duty, and one which some solicitors, I believe, decline to take.

The question is, within which class did Mr. *Watson* fall as regards Mrs. *Dooby*? If he fell within the first or second class, assuming that, as regards the second class, the mortgage was approved by Mrs. *Dooby*, then he is free, except from a charge of negligence, which, as I have said, falls to the ground by reason of the defence of the statute. If, on the other hand, he falls within the third class, if he was responsible to her for the selection of a good mortgage, then it becomes a serious question whether he did not make a bad selection, and whether, having accepted the money on trust to invest on a good mortgage, he is not responsible for having selected a mortgage which turns out not to be good.

But there is one other matter I must deal with before adverting to the facts. It is said, and Mr. *Brice* has said it plainly in reply, though he hesitated to do so in the opening, that Mr. *Watson's* interests conflicted with his duty. [It appeared that one *Charles Marsdin* and *W. Marsdin*, who bought the property from *Charles*, were indebted to Mr. *Watson's* firm, who were paid out of the money advanced on the mortgage. His Lordship then stated and commented on the facts so far as they could be ascertained, and came to the conclusion that there was not the slightest impro-

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priety in the transaction. His Lordship then proceeded:—] My inference is that Mr. *Watson* was asked by Mrs. *Dooby* to find an investment for her £5000; that he did find the investment for the £5000, which came to his hands by a fortunate coincidence; that he told her of this particular mortgage, and that she approved it, knew that it was *Marsdin's* mortgage, and was content. Perhaps she did not inquire enough; perhaps she confided too much in Mr. *Watson*, and was altogether content to take his word. That is quite possible. From the correspondence—the letters written by Mrs. *Dooby* herself and by Mrs. *Dennis*, her daughter, at her instance—and from what I have been able myself to observe in the witness-box, I think it would be reasonable to conclude that Mrs. *Dooby* did not take things quite so easily; but if she did, and the result is not what she thinks it ought to be, again it is ground for an action of negligence, and nothing more. Not that I must be understood as saying there would be any ground for such an action, because I do not go into that question, as that part of the case has not been, and in fact could not be, thoroughly threshed out.

My conclusion, therefore, is that the relation between Mrs. *Dooby* and Mr. *William Watson* was that of the first class to which I have referred; that in the first instance it was one of the second class—that is to say, she asked him to invest £5000 on mortgage to be found by him and approved by her; that before anything was really settled the mortgage was found, and therefore the £5000 was left in his hands to be invested on a particular mortgage. That was a trust for that purpose, not in the technical sense which I have endeavoured to explain, but a trust, a confidence, a duty, and it was performed when once the deed was executed; and when once the mortgage was a completed transaction the relation ceased. There was no further duty, and Mr. *Watson* was free. [His Lordship then disposed of an objection that the mortgage was of part only of a farm, and of an objection that Mr. *Watson* had allowed Mrs. *Dooby* to consent to the sale of a small piece of the land.]

One thing more requires to be mentioned. It is said that Mr. *Watson* did not take proper precautions to ascertain the value of this land, and that he ought to have employed some

independent valuer, and cases have been cited in which trustees have been made responsible for not having employed an independent valuer, or otherwise not having taken proper means to get information on which they could rely as trustees. The only valuation mentioned was taken for a different purpose, and not by Mr. *Watson*, and if anything had depended upon that I certainly should not have been disposed to excuse Mr. *Watson*. The valuer, however good a man he may have been, was employed for other persons and under other circumstances, and valued the land at a certain sum, and Mr. *Watson* did not take any other precaution. But I do not propose to decide whether he ought to have taken other precautions or not. That would all come under the question of negligence. If there had been a trusteeship—the trusteeship of money for Mrs. *Dooby*—the confidence that he was to invest it at his own discretion, then all those matters would be of vast importance, but, as I have said before, Mrs. *Dooby*, though she may have been too hasty, and may have been too confiding, approved of this mortgage. That is my conclusion of fact.

Under these circumstances I have very little to say about the cases. Many of them were cited, and I have been through them all with care. To my mind, the one case which is most useful in laying down the principle is *Craig* v. *Watson* (1), and the principle is to be found in the passage (2) beginning "Mr. *Watson* was not agent and solicitor only, but also trustee." But it is impossible to read that case—and particularly the passage at the bottom of p. 434—without seeing that Lord *Langdale* considered that the solicitor there did act for some sinister object of his own, and with a low view of his duty which Lord *Langdale* thought ought not to prevail among the profession. *Smith* v. *Pococke* (3) also was a case (and we have the Vice-Chancellor *Hall's* authority for it, in *British Mutual Investment Company* v. *Cobbold* (4),) of impropriety and fraud, and therefore it has little application when once you ascertain, as I have done, that there was no impropriety and fraud. *Burdick* v. *Garrick* (5) is a case shewing that the doctrine of trustee and *cestui que trust* may and ought

(1) 8 Beav. 427.
(2) Ibid. 433.
(3) 2 Drew. 197.
(4) Law Rep. 19 Eq. 630.
(5) Law Rep. 5 Ch. 233.

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to be extended to many cases to which one would not, perhaps, without consideration, have thought it did extend; and *Banner* v. *Berridge* (1) expounds that view with reference to *Burdick* v. *Garrick* (2), and the passages which are quoted from Lord *Hatherley's* judgment. *Mare* v. *Lewis* (3), I think, is only an application of the law to the particular facts which are there mentioned, and shews that there must be impropriety or fraud (the two things with reference to a solicitor are one and the same) in order to raise an equity against a solicitor with reference to his conduct towards his client. The Vice-Chancellor makes observations on a trust for a general investment which may want, and I think will want, reconsideration if the point ever comes up again. But they are not directly in point here, and therefore I pass them by without further comment. The other cases, although more or less instructive and useful, I do not think bear directly upon this case, for the reason that they all, more or less, tend to this one point. If we find a trustee, and find property entrusted to him either for a person or for a series of persons in succession, we have an express trust, and the *Statute of Limitations* does not apply. Then if you have a breach of moral duty, you have fraud, and you can at once make him liable on that ground. I say that that state of circumstances does not exist here.

I think Mr. *William Watson* was not in the position of trustee in that sense. I think he was solicitor only, and not trustee, and therefore the action fails against *James Watson*, as his partner and legal personal representative. As regards *William Marsdin*, there is no doubt he is mortgagor, and the account of what is due to the Plaintiff in respect of the mortgage may be directed with liberty to apply. What can be done under that liberty to apply, will have to be considered. I cannot do anything more now than that. Of course, there will be no order as regards the costs of the mortgagor, and equally, of course, the Plaintiff must pay the costs of *James Watson*.

Solicitors for Mrs. *Dooby*: *Harper & Battcock*.

Solicitors for *J. Watson*: *Collyer-Bristow, Withers & Co.*

(1) 18 Ch. D. 254. (2) Law Rep. 5 Ch. 233. (3) I. R. 4 Eq. 219.

C. M.

In re BARBER.

C. A. 1888 April 16.

Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 2, 32 [*Revised Ed. Statutes, vol. x., pp.* 982, 990]—*Trustee incapable of acting—Paralytic—Person of unsound Mind.*

A person who is paralytic and deprived of the power of speech and unable to read and write, but is not suffering from any mental disease, is not a person of unsound mind within the *Trustee Act*, 1850, s. 2. Therefore in such a case the petition should not be presented in Lunacy, but in the Chancery Division.

THIS was a petition presented in Lunacy and in the Chancery Division for the appointment of two new trustees of the marriage settlement of *F. Barber* and *Ellen* his wife, dated the 30th of January, 1856, and of the will of *F. Barber*, deceased, dated the 22nd of October, 1869, in the place of *M. Everington*, who was dead, and *C. Barber*, who was alleged to be of unsound mind, and for a vesting order.

Mr. *N. B. Elliott*, a medical practitioner, stated in his affidavit that *C. Barber* had had four paralytic strokes, and had lost the power of speech, and was unable to read or write or to attend to business; and he further said: "It is difficult to form or express an opinion as to the said *C. Barber's* state of mind, owing to his loss of speech and his inability to write. He can see and hear, and is able to recognise his friends and relatives, who attend to or visit him. I also think he is able to understand what is said to a certain extent, but not sufficient to enable him to transact any business. It is of course difficult to say how far he understands what is said by reason of his inability to reply. It would be hopeless to attempt to read or explain any documents to him, or to obtain his signature to them, or to enter upon any matters of business with him." He also stated that there was no probability of any improvement in his bodily or mental condition.

G. E. Jeffery, for the petition, relied on *In re Dewhirst's Trusts* (1); *In re Martin's Trusts* (2).

(1) 33 Ch. D. 416, 419.

(2) 34 Ch. D. 618.

C. A. 1888 *In re* BARBER.

COTTON, L.J.:—

In my opinion we ought not, upon the evidence before us, to come to the conclusion that this gentleman is unable to act from infirmity of mind. He may be incapacitated from acting, but his incapacity does not appear to arise from infirmity of mind. We have considered whether the order might not be made in the Chancery Division only by virtue of the jurisdiction delegated to us at the special request of the Lord Chancellor that we should act as Judges of the Chancery Division in matters connected with our jurisdiction in Lunacy, but we think that such jurisdiction can only be exercised in aid of the jurisdiction in Lunacy, and that we ought not to make an order only in the Chancery Division. The proper course in this case will be to present a petition in the Chancery Division. If it will save expense the Petitioners may amend the existing petition, and take it off the file of the Registrar in Lunacy: and there will be no difficulty in obtaining an order to read the evidence now produced before us, upon the hearing of the petition.

FRY and LOPES, L.JJ., concurred (1).

Solicitors: *Lee, Ockerby & Everington.*

(1) See *In re Lemann's Trusts*, 22 Ch. D. 633.

M. W.

In re BATHO.

C. A. 1888 May 14.

Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 3, 5 [*Revised Ed. Statutes, vol. x., pp.* 983, 984]—*Appointment of new Trustees in place of lunatic Trustee and Person out of Jurisdiction—Vesting Order as to Mortgage Debt and Stock.*

The property comprised in a settlement consisted of money lent upon a mortgage of freeholds vested in the two surviving trustees, and of a sum of consols standing in their names. One of these two surviving trustees was a lunatic, and the other was resident out of the jurisdiction; and under a power in the settlement two persons were appointed new trustees in their places. Upon a petition by these two new trustees and by all the beneficiaries praying for an order reappointing the new trustees as trustees of the settlement, and vesting in them the trust property:—

The Court declined to reappoint the new trustees, but under sect. 3 of the *Trustee Act*, 1850, vested the lands subject to the mortgage in the new trustees, and under sect. 5 of the same Act vested the mortgage debt and the right to call for a transfer of the consols in the trustee of sound mind resident out of the jurisdiction, and, it appearing that he was out of the jurisdiction, vested the mortgage debt and the right to call for a transfer of the consols in the new trustees.

THIS was a petition entitled in Lunacy and in the Chancery Division, presented by the two trustees of, and all the beneficiaries under a settlement dated in 1843, and praying for an order reappointing the two trustees as trustees of the settlement, and vesting in them the property subject to the trusts thereof. The two trustees, who were co-petitioners, had been appointed in April last trustees of the settlement under a power therein contained in the place of the two surviving trustees thereof, of whom one was a lunatic, and the other resident out of the jurisdiction. The committee of the lunatic trustee was a co-petitioner. The property subject to the settlement comprised a sum of money lent upon a mortgage of freeholds vested in the said two surviving trustees, and a sum of consols standing in their names.

P. S. Stokes, in support of the petition:—

Where any person is entitled jointly with a lunatic to any stock or *chose in action* upon any trust the Court has, under sect. 5 of the *Trustee Act*, 1850, power to vest such stock and *chose in action* either in the person so jointly entitled or in such

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last-mentioned person together with any other person or persons; but the Act does not empower the Court to vest stock or a *chose in action* directly in new trustees in a case where such stock or *chose in action* is vested in a lunatic jointly with another person. I submit, however, that the difficulty can be got over by vesting the stock and *chose in action* in the first instance in the trustee out of the jurisdiction.

THE COURT (*Cotton* and *Fry*, L.JJ.) declined to re-appoint the new trustees, but made the following order:—

Under sect. 3 of the *Trustee Act*, 1850, vest the lands subject to the mortgage in the new trustees; under sect. 5 of the same Act vest the mortgage debt and the right to call for a transfer of the consols in the trustee of sound mind who is resident out of the jurisdiction; and it appearing that he is out of the jurisdiction vest the mortgage debt and the right to call for a transfer of the consols in the new trustees.

Solicitor: *J. E. Shaw.*

W. W. K.

C. A. 1888 KAY, J. *Jan.* 24, 25. C. A. *May* 30, 31.

In re LONDON CELLULOID COMPANY.

Company—Fully paid-up Shares—Winding-up—Agreement by Company to register Contract as to fully paid-up Shares—Payment in Cash—Issue of Shares at a Discount—Ultrà Vires—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628.]

An agreement was entered into between an English manufacturing company and a French company, that the *French Company* should render to the *English Company* certain services, that in consideration of those services the *English Company* should transfer to the *French Company* or their nominees 1000 shares of £10 each in the *English Company* to be credited as fully paid-up, with a provision that before they were issued the *English Company* should procure the agreement to be registered. The services were rendered and the 1000 shares were allotted, as to 800 to the *French Company*, and as to 200 to *S.*, a nominee and a director of the *French Company*. *S.* transferred the 200 shares to *H.*, one of the directors of the *English Company*, who afterwards transferred 100 of them to *B.*, another of the directors. The agreement between the two companies was never registered; but *B.* and *H.* deposed that the directors had given their solicitor directions to register it, and that, until after the company had been ordered to be wound up, they believed that it had been registered. Certificates for the 1000 shares had been issued stating them to be fully paid-up:—

Held, that the liquidator was not estopped from requiring *B.* and *H.* to

pay calls as holders of shares on which nothing had been paid in cash, for that *S.*, *B.* and *H.* knew all along that the shares had not been paid up in cash, which made the case wholly distinct from *Burkinshaw* v. *Nicolls* (1), where a transferee had in the ordinary course of business, and without anything to put him on inquiry, bought shares the certificates of which stated them to be fully paid up, and was held entitled to rely on the certificates as evidence against the company and the liquidator that the shares had been fully paid up in cash.

Whether if *S.* had acquired the shares under such circumstances as to give him by estoppel a right to the shares as fully paid up he could have transferred this right to *B.* and *H.* who knew the true facts, *quære.*

Held, also, that the liquidator was not debarred from requiring *B.* and *H.* to pay calls, on the ground that the company, which had agreed to register the contract, was taking advantage of its own wrong by suing for calls which could not have been sued for if the contract had been registered; for that the right to sue for calls did not arise from the failure to register the contract, but from the fact of taking shares, and that the liability thence arising to pay up the shares in cash could only be taken away by a duly registered contract, and not by an agreement to register one.

Decision of *Kay*, J. affirmed.

Held, by *Kay*, J., as to another class of shares issued by the *English Company* to *B.* and *H.* at a discount, that such issue was *ultrà vires*, a limited company having no power to issue shares at a discount (2).

THE *London Celluloid Company* was registered in February, 1881, with a nominal capital of £30,000 divided into £10 shares, and an order for winding it up was made on the 20th of December, 1884. The Appellants *Bayley* and *Hanbury* were two of the directors. The object of the company was the manufacture of celluloid, a compound applicable for making billiard balls, combs, and other purposes, and of other substances applicable for like purposes.

On the 18th of July, 1882, an agreement was entered into between *La Compagnie des Matières Plastiques* (henceforth called the *French Company*) and the *London Celluloid Company* (henceforth called the *English Company*). By clause 1, the *French Company* was to send over to *England* a person or persons competent to organize a manufactory of celluloid as made by the *French Company*, and the person or persons so sent were to organize the manufactory, and instruct persons to be nominated by the *English Company* so that they could conduct the manufacture: (3.) In

(1) 3 App. Cas. 1004.

(2) See *In re Almada and Tirito Company*, 38 Ch. D. 415.

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consideration of the above services the *English Company* were to cause to be transferred to the *French Company* or their nominees 1000 shares of £10 each in the capital of the *English Company*, numbered from 1901 to 2900 both inclusive, "such shares to be credited as fully paid up, and to be deferred shares so far as relates to dividend as hereafter mentioned." (4.) Provided that the 1000 shares should be forthwith issued and allotted as fully paid up to the *French Company*, and deposited at the bankers for the time being of the *English Company* in the joint names of the two companies, and if and when the *French Company* had performed what they had by clause 1 undertaken to do the same were to be transferred to the *French Company* or their nominees. The agreement went on to provide as to the right of the holders of these shares to receive dividends, and after some other provisions, not material for the purposes of the present report, it was provided by clause 8, "Before the above-mentioned 1000 shares are issued and allotted in trust as aforesaid, the *English Company* shall procure this agreement to be filed with the Registrar of Joint Stock Companies in *England*." It was provided that this agreement should be taken to be an English contract made in *England* and governed by English law.

The above agreement was never registered under sect. 25 of the *Companies Act*, 1867.

On the 23rd of July, 1883, at a board meeting of directors at which both the Appellants were present, a resolution was passed that 1000 shares, numbered respectively 1501 to 2500 (both inclusive), should be issued and allotted forthwith as fully paid-up shares to the *French Company*, and deposited at the *English Company's* bankers in the joint names of the two companies. On the 30th of July, 1883, it was resolved that these shares should be allotted to the *French Company* and Mr. *Sauvée*, their nominee, and certificates were issued and handed to the secretary on deposit till the shareholders' meeting. The shareholders' meeting was held on the 9th of August, 1883, and a resolution was passed, "That the shares issued to the *French Company* under the agreement of the 18th of July, 1882, be handed over to Mr. *Sauvée* acting on behalf of the *French Company*, on the understanding that the said company will give full information and instructions in

the manufactures of celluloid and celluloid articles on the terms as theretofore." *Sauvée* was a director of the *French Company*.

800 of the 1000 shares were allotted to the *French Company*, and 200 to *Sauvée*, their nominee, and certificates in which they were stated to be paid up in full were issued.

On the 19th of November, 1883, *Sauvée* transferred the 200 shares to the Appellant *Hanbury*, who on the 24th of the same month transferred 100 of them to the Appellant *Bayley*.

There was no evidence as to the circumstances under which the transfer from *Sauvée* took place, nor what was the consideration for it.

On the 20th of December, 1884, an order was made to wind up the company.

Both the Appellants deposed that the directors gave the solicitor of the *English Company* instructions to register the agreement, and that they believed he had done so, until, long after the winding-up order, they discovered that it had not been registered. The solicitor of the company denied having ever received instructions to get the agreement registered; and deposed that *Bayley* himself proposed that, to save expense, the registration should be effected by the secretary and not by a solicitor, and that *Bayley* thereupon took upon himself to see to the registration: but the Court of Appeal did not consider it necessary to determine whether such instructions had been given or not.

Bayley and *Hanbury* having been placed on the list of contributories for the full nominal amount of the above 100 shares each, this was a summons taken out by them to have their names expunged from the list as to these shares.

The summons came on for hearing before Mr. Justice *Kay* on the 24th and 25th of January, 1888. Besides the shares specifically mentioned above, the summons related to certain shares in the *English Company* which had been issued by the company to *Bayley* and *Hanbury* respectively as fully paid-up in consideration of a payment by them of £4, at a discount of £6 per share, and as to which shares *Bayley* and *Hanbury* had been settled on the list of contributories for the balance of £6 per share. As to these latter shares his Lordship held that the issue of shares at a discount was *ultrà vires* of the company, since that would be

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diminishing the capital of the company in a mode not contemplated by the *Companies Acts*; and, accordingly, that *Bayley* and *Hanbury* were liable to pay the difference between what they had actually paid and the nominal amount of the shares. It is unnecessary to report his Lordship's judgment in full on this point in consequence of the more recent case of *In re Almada and Tirito Company* (1), in which the Court of Appeal, it will be seen, having the point before them for decision, took the same view as Mr. Justice *Kay* as to the inability of a company to issue shares at a discount.

Consequently the present report deals only with the case of the 200 shares originally allotted to *Sauvée* and subsequently transferred to *Bayley* and *Hanbury* under the circumstances above stated.

Marten, Q.C., and *T. Ribton*, for *Bayley*, cited *Burkinshaw* v. *Nicolls* (2) and *Barrow's Case* (3).

Millar, Q.C., and *T. Ribton*, for *Hanbury*.

Renshaw, Q.C., and *Bramwell Davis*, for the liquidator.

Kay, J. (after stating the facts, continued):—

It is said that the well-known class of authorities, of which *Burkinshaw* v. *Nicolls* is an example, applies to this case, and that, there having been a purchase by M. *Sauvée* from the *French Company* of these shares without any notice that the contract in respect of that transaction with the *French Company* had not been registered under the Act of 1867, and these shares having been allotted to M. *Sauvée* as fully paid-up shares, these directors of the *English Company*, although they knew the whole of the facts, were at liberty to buy those shares from M. *Sauvée* and to treat them as being fully paid-up shares, although no such contract as the Act of 1867 required was ever registered. As to the evidence on this part of the case, I find no trace in the books of the company of any arrangement for value, or otherwise, between M. *Sauvée* and the *French Company*; and the argument which is

(1) 38 Ch. D. 415. (2) 3 App. Cas. 1004.
(3) 14 Ch. D. 432.

set up by the directors who seek to escape liability is made out partly by their affidavits and partly by some other entries in the books of the company. There is not anywhere in any passage of their affidavits, or in any statement in any document which is submitted to me, anything which shews that M. *Sauvée* obtained these shares from the *French Company* for value, or that he obtained them from the *French Company* without notice that there was no registered contract. Neither of these things is proved. Now, upon whom is the onus of proof? Surely the onus of proof is upon the directors who knew all the facts and who come here to try and escape liability upon shares which were never in fact proposed to be treated as fully paid-up shares; because, as I have said, the contract—if there was such a contract with the *French Company*—was never registered under the Act of 1867; and if the onus of proof be upon the directors, all I can say is, that onus has not been discharged. They are the people who knew all about the matter, and whose duty it was to obtain the registration of the contract, if it was a contract actually made and one which could be registered under the Act of 1867. They never did obtain that registration or take any steps to do so; and they now come to say, "Although we knew all about it, free us from liability in respect of these shares which we took, because you must assume,"—or "infer," as it is rather put—"that M. *Sauvée* obtained them for value from the *French Company*." I decline to make any assumption in their favour. I say they are the persons who ought to prove that, and there is no such evidence before me. For all that I know, M. *Sauvée* may have held the shares as trustee for the *French Company*; or, if he did not hold them as trustee, they might have been a free gift from the *French Company* to him. Whether there was a free gift or not, M. *Sauvée* might have been aware that the contract was not registered under the Act of 1867, as it should have been when he took them. I have no evidence about that at all; therefore I cannot assume or infer in favour of these directors that *Sauvée* was a purchaser for value, or that he had not notice of the fact that the contract was not registered. What makes the case most remarkable is, that I have an affidavit by the solicitor of the *English Company* to whom the directors referred about this

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very matter of the registration, and who says that, up to a certain point, he had to do with these negotiations with the *French Company*, and that he did prepare a draft agreement which was to have been executed on both sides, and that Mr. *Bayley*, one of these very Applicants, objected to the expense which would be incurred in employing a solicitor and said that the matter could be transacted better by the secretary of the company, and at less expense than by employing a solicitor, and that Mr. *Bayley* took upon himself to manage the whole transaction. Therefore, if this contract was made, and if it was not registered, no one is so much to blame for the non-registration as Mr. *Bayley*. However, I do not rely upon that at all; but I do rely upon this—I think, under the circumstances, that it is for Mr. *Bayley* to prove, if he can, that this case comes within the class of authority of which *Burkinshaw* v. *Nicolls* (1) is one, but I am entirely without any evidence of that. Therefore, as regards these shares, I hold that the Applicants are properly placed upon the list.

G. I. F. C.

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Bayley and *Hanbury* appealed from Mr. Justice *Kay's* decision as above reported, and the appeal, which related solely to the shares which were the subject of that decision, was argued on the 30th and 31st of May, 1888.

Marten, Q.C., and *T. Ribton*, for *Bayley*:—

If the contract had been registered, these shares would have been fully paid-up shares. Now the company undertook to register the contract, and neither the company nor the liquidator can take advantage of their own wrong in not having done so.

[Cotton, L.J.:—*Bayley* does not state how he acquired his shares. Moreover, he was a director, one of the persons whose business it was to see that the act was done.]

The directors gave instructions to have it done, and believed it to have been done, and so are in no default. The liquidator is in no better position than the company: *Burkinshaw* v. *Nicolls*.

[Cotton, L.J.:—In that case there was a transfer for value in the ordinary course of business.]

(1) 3 App. Cas. 1004.

Here the *French Company* took the shares in the ordinary course of business, in pursuance of a contract for value.

[COTTON, L.J.:—Does it follow that a transferee who knows all about the circumstances can avail himself of estoppel because his transferor could?]

We say that the case is similar to that of purchase for value from a purchaser for value. If either the first purchaser or the second purchaser bought without notice, the title of the second is good.

[BOWEN, L.J.:—How do you raise any *primâ facie* case of estoppel?]

The contract, the resolutions of the company, and the issue of the shares as fully paid-up shares, amount to a representation that all things had been done which was requisite to make these shares fully paid-up, and the *French Company* had a right to assume that all things had been properly done: *Burkinshaw* v. *Nicolls* (1). Now, as to *Bayley's* position, the case is governed by *Barrow's Case* (2).

[COTTON, L.J.:—I feel some difficulty about that case; it appears to treat the liability to calls as an equity instead of a legal liability.

BOWEN, L.J.:—Can you support the proposition that a person who gets a good title by estoppel can transfer it to one who knows the true facts?]

Yes; if a person once gets a good title, he ought to be able to give a good title to any one else.

Then we say that the company cannot take advantage of its own wrong in not registering the agreement.

[COTTON, L.J.:—Does that principle give you more than a right of cross-action?]

Yes; the cases shew that it will support a plea in bar: *Molton* v. *Camroux* (3).

[BOWEN, L.J.:—That case went on *Davis* v. *Bryan* (4), which

(1) 3 App. Cas. 1004.
(2) 14 Ch. D. 432.
(3) 2 Ex. 487; 4 Ex. 17
(4) 6 B. & C. 651.

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shews that an annuity deed not inrolled was only voidable at the option of the grantor.]

The Court laid down a general principle, which was approved in *Hooper* v. *Lane* (1).

[Bowen, L.J.:—Can you say here that the right of action arises through the default of the company?]

Yes; since there would have been no right of action if the company had registered.

[Fry, L.J.:—It seems to me not clear that a contract to register the agreement would bind the company.]

The breach of a similar contract has been decided to give a right of proof against the company: *Ex parte Appleyard* (2); and *Arnot's Case* (3) is in our favour as to the effect of an agreement to take fully paid-up shares.

Millar, Q.C., and *T. Ribton*, for *Hanbury*:—

By clause 8 of the agreement, registration of the agreement was a condition precedent to the liability of the *French Company* to take shares. There was, therefore, no liability under the agreement to take shares unless the agreement was registered. The winding-up does not alter the case in that respect: *Waterhouse* v. *Jamieson* (4). If there is a condition precedent not fulfilled by the company, the fact of the Appellant being on the register cannot do away with the effect of the non-fulfilment. By sect. 23 of the *Companies Act*, 1862, two things are required to make a person a member, being on the register and having agreed to become a member. Here there was no agreement to become a member until the agreement had been registered.

[Cotton, L.J.:—Does not your agreement with the company arise by your taking a transfer from *Sauvée*, and asking the company to register you as a member? If, then, you knew the shares not to have been paid up in cash, that is an agreement to take the shares on that footing.]

If there is a condition precedent which has not been performed, the shareholder can go back to the original contract: *Pellatt's*

(1) 6 H. L. C. 443, 551.
(2) 18 Ch. D. 587.
(3) 36 Ch. D. 702.
(4) Law Rep. 2 H. L., Sc. 29.

Case (1); *Simpson's Case* (2); *Reese River Silver Mining Company* v. *Smith* (3). It is said against us that the directors are liable for this contract not having been registered. If so, the case is one of damages for negligence. How can it be contended that the proper measure of damages for their negligence is the amount of calls payable on any of the shares issued as paid up in full which they may happen to have taken? We say, then, that the directors who believed the contract to have been registered are in no default, and that if they are, the making of them contributories does not give the right measure of damages.

Renshaw, Q.C., and *Bramwell Davis*, for the liquidator, were only called upon as to the point that the company were seeking to take advantage of their own wrong:—

We say that the Appellants, not having been parties to the contract, cannot raise the point that the company are seeking to take advantage of their own wrong. We say, further, that there was no contract to bind the company at all, the contract not having been under its common seal. It was, in fact, only heads of terms which had been agreed to, and which were intended to be embodied in a more formal contract. A shareholder retaining his shares cannot bring an action against the company for misrepresentations by which he was induced to take them: *Houldsworth* v. *City of Glasgow Bank* (4); nor has a shareholder, after a winding-up order, any remedy for a breach of a contract that the shares shall be fully paid up: *In re Addlestone Linoleum Company* (5). His only remedy is to apply for rescission before the winding-up. The liquidator is not seeking to enforce the contract between the two companies, and his right of action does not arise from a breach of it by the company. The Appellants took a transfer of the shares, and applied to the company to register the transfer—they thereby became shareholders. Estoppel is out of the question, as they and *Sauvée* took the shares with knowledge of the true facts. They must, then, in order to escape liability, prove that the shares have been paid up in cash, or that

(1) Law Rep. 2 Ch. 527.
(2) Ibid. 4 Ch. 184.
(3) Law Rep. 4 H. L. 64.
(4) 5 App. Cas. 317.
(5) 37 Ch. D. 191.

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there is a registered contract to the contrary. If sect. 25 is to be got rid of by an agreement that a contract shall be registered, it is reduced to a nullity. But that is not so. The liability to pay up in cash can only be got rid of by a contract which is actually registered.

Marten, in reply:—

As to the argument that the Appellants cannot claim the benefit of estoppel because they knew the real facts, it is clear that they did not know that the agreement had not been registered, and a director is not fixed with constructive knowledge of everything that goes on in the conduct of the company's affairs: *Hallmark's Case* (1); *In re Denham & Co.* (2).

Cotton, L.J.:—

This is an appeal by two of the directors from a decision of Mr. Justice *Kay* refusing to release them from their liability on shares issued as fully paid up and afterwards transferred to them. The shares had not been paid up in cash, and no contract for their being paid up otherwise had been registered under the *Companies Act*, 1867 (30 & 31 Vict. c. 131), s. 25. One point taken by the Appellants was that the certificates which stated that the shares were fully paid up were to be taken as conclusive evidence of the fact, and *Burkinshaw* v. *Nicolls* (3) was relied on in support of this. But we must consider what that case really decided. It is said here that the contract with the *French Company* was in the ordinary course of business, and that *Sauvée* was entitled to rely on the representation of the *English Company* that the shares were fully paid up. But *Sauvée* was a director of the *French Company*, and must be taken to have known the contents of the agreement, and to have known that the shares were not going to be paid up in cash, and that registration of the agreement was necessary to legalise the issue of the shares as fully paid up, and the Appellants themselves being directors, must be taken to have had the same knowledge. In *Burkinshaw* v. *Nicolls* share certificates were issued which represented the

(1) 9 Ch. D. 329. (2) 25 Ch. D. 752.
(3) 3 App. Cas. 1004.

shares to be fully paid up, a person to whom some of them were issued sold the shares in the ordinary course of business to a person who bought on the faith of that representation, without anything to put him on inquiry whether it was true, and the House of Lords held that as against such a purchaser the company and the liquidator were bound by the statement, on the ground that it was evidence on which as against the company the purchaser was entitled to rely that the shares had been paid up in cash. Lord *Cairns* said (1): "In the course of business *Goulton* transfers, for valuable consideration, to a transferee, a share, as to which there is a statement in the certificate made by the company, that the money had been paid up. Now I desire to know in what way this section affects a transaction of that kind. It appears to me that it leaves altogether untouched the question of the payment of the money upon the share, which payment it declares shall, no doubt, be an attribute or a condition of every share in the company. But how that is to be, or what is to be evidence of that payment, it leaves altogether untouched. If the money is paid, and if the receipt is given for it, of course no question could be made but that the transferee would have a right to hold it as a paid-up share; but if a receipt is given for the money by the company, and the share passes into the hands of a person who has given valuable consideration for it, and knows nothing about the fact that the payment has not really taken place, there is nothing whatever in this section which would in any way invalidate his title. He comes before the Court not in any way affecting to break in upon the enactment which I have read. He says 'I bow to the words of the enactment. I have not in any way attempted to interfere with it, but I have taken, in the course of business, a share, in regard to which I have the representation of the company that that section has been complied with.'" Lord *Cairns* says that there is an admission by the company that it had received the money, and that admission binds the company and the liquidator. Lord *Blackburn* says (2): "In the present case there is no such registered contract, and consequently the shares are payable in cash, but then the section does not say that that is to be conclusive against everyone, nor, as it was argued,

(1) 3 App. Cas. 1016. (2) 3 App. Cas. 1026.

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that any one who has become a shareholder under any circumstances shall be compelled to pay them up in cash. That is not the statute. These shares were bought, and the liquidator may require payment of the calls, unless either it be proved that they were paid in cash, or circumstances have arisen which render it unnecessary to prove that. The present case is of the latter description. Now sometimes there is a degree of odium thrown upon the doctrine of estoppel, because the same word is used occasionally in a very technical sense, and the doctrine of estoppel *in pais* has even been thought to deserve some of the odium of the more technical classes of homologation. But, the moment the doctrine is looked at in its true light, it will be found to be a most equitable one, and one without which, in fact, the law of the country could not be satisfactorily administered. When a person makes to another the representation 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action; and that is what I apprehend is meant by estoppel *in pais* or homologation. But whether the term be used in its more or less technical sense, I take it that one common idea runs through the whole, viz., that your rights, as between yourselves, must be regulated upon the basis that that is accurate which you induced the other side to take as the basis upon which he was to act." The other Lords proceeded on the same ground. In the present case no representation was made that the contract had been registered, if there had been any such representation we should have had to consider its effect. Here the Appellants cannot say that any representation was made either to *Sauvée* or themselves on which they were entitled to rely that the shares had been paid up in cash, and they are, therefore, unable to avail themselves of *Burkinshaw* v. *Nicolls* (1).

There remains the only point as to which we called on Mr. *Renshaw*, namely, whether the company which had omitted to

(1) 3 App. Cas. 1004.

register this contract was not taking advantage of its own wrong by seeking to enforce a liability which could not have been enforced if the contract had been registered. I will not enter on the question whether this agreement to register the contract was binding on the company. I will assume that it was. Then it is said if the company were a living company it would be taking advantage of its own wrong if it sued for calls on these shares. We were referred on this point to *Molton* v. *Camroux* (1). In that case there were contracts to grant an annuity to commence at once and a deferred annuity, the consideration for each of which was paid. No enrolment took place. The action was by the administratrix of the annuitant to recover the consideration money as money received for the use of the annuitant, and it was decided that the grantee could not avail himself of non-enrolment. This was decided on the authority of *Davis* v. *Bryan* (2) where Mr. Justice *Bayley* said: "This appears to be a clear case on principles both of law and honesty. . . . A bargain was made, and the testator paid a consideration of £300, and the defendant agreed for that to pay a certain annuity. The testator received the whole of that which he bargained for, and now his representative says that the contract was void from the beginning. . . . Then is the contract void? The Act of Parliament says, that unless a memorial be duly enrolled, the deed of which no memorial is enrolled shall be void; but in many cases such words have been held to make the instrument voidable only at the will of the party, and I think we are at liberty to put that construction upon them in the present case." The action was on the ground of a total failure of consideration, and, if the plaintiff had any right of action at all, it arose from his failure to do what it was his duty to do. The distinction between that case and the present is obvious. Here the company or the liquidator is not suing on any right arising from the breach of contract, but by virtue of the obligation imposed by the Act of Parliament, and if the contention of the Appellants were allowed the 25th section would be almost annulled. The Appellants urge that if the company agrees to register, and does not register, the holder of the shares ought to be subject to no more liability to the company than if

(1) 2 Ex. 487; 4 Ex. 17. (2) 6 B. & C. 651, 655.

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they had registered. That is not what the Act says; it provides that there shall be liability to pay up in cash unless a contract determining otherwise shall have been registered.

It has been urged that a liquidator is in no better position than the company. That is not universally true. A shareholder may have taken shares under circumstances which entitle him to say to the company, while a going concern, "relieve me from these shares;" but on a winding-up order being made that right is gone, unless proceedings have already been commenced to enforce it. So far the liquidator is in a better position than the company. In certain circumstances a person who had taken shares which turned out not to be fully paid up, could claim damages against the company, but that cannot be done here, for a shareholder cannot prove in competition with the creditors of the company, and it does not often happen that when a company is wound up there is a surplus after paying the creditors. A contract by the company not to enforce payment of the calls on a share not effectually paid up would I apprehend be *ultrà vires*. *Waterhouse* v. *Jamieson* (1) was referred to as shewing that the liquidator is in no better position than the company, but the case only decided that the liquidator was bound by a statement of the company as to the amount of capital that had been paid up, a statement the falsehood of which he had no reason for suspecting, and in the faith of which statement he had taken his shares. I am of opinion that the appeal fails.

Bowen, L.J.:—

I am of the same opinion. Our conclusion appears to me the necessary result of a logical consideration of the 25th section. The Legislature there enacts that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." Nothing can be clearer than this, there is a statutory liability to pay the whole amount in cash, which can only be avoided under

(1) Law Rep. 2 H. L., Sc. 29.

the statute in one way—by a registered contract. Can there be any other way of escape? Only this, that if the company has so acted as to preclude itself from denying that the Act has been complied with, that is conclusive evidence that the Act has been complied with. The company may represent to third persons, and induce them to act on the faith of the representation, that the shares have been paid up in cash. If such a representation is made by the company, and acted on by third parties, who have no notice that it is untrue, the company cannot afterwards say that the shares have not been fully paid up. An estoppel of that kind operates against the liquidator as well as against the company, and in such a case the holders of the shares are not liable for calls. *Burkinshaw* v. *Nicolls* (1) shews that such an estoppel may arise. The Act is not thereby evaded, but there is evidence, which must be taken as conclusive, that its requisitions have been complied with. The decision in that case was a ruling on a point of evidence, and it is dangerous to turn a ruling on a point of evidence into a rule of law. The company had issued certificates stating that the shares in question were fully paid up, they were sold in the ordinary course of business, and the House of Lords held that the purchasers were entitled to rely on the certificates as sufficient evidence that the shares were fully paid up. How can that ruling be applied in favour of *Sauvée?* The facts are wholly inconsistent with the supposition that he was ignorant of the shares not having been paid up. The agreement made it clear that the shares were not to be paid up in cash, there is no reason for thinking that *Bayley* did not know this, and he has abstained from saying anything about it. My inference is that *Bayley* and *Sauvée* knew it throughout.

If the company had made a representation that there was a registered contract under which these shares were issued as fully paid up, and had induced any one to take shares on the faith of it, I do not say that there might not be an estoppel, not that the Act could be evaded, but the company, on the question of evidence, might be estopped from alleging the truth.

Then the Appellants urged that though the company might not be estopped from denying that the money had been paid on the

(1) 3 App. Cas. 1004.

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shares, or that the agreement had been registered, still it could not sue for calls, because it would be taking advantage of its own wrong in not registering the contract. The maxim that no man can take advantage of his own wrong must be carefully considered, and expressed in more precise terms, before it can be safely applied. It means that a man cannot enforce against another a right arising from his own breach of contract or breach of duty. The observations of Baron *Bramwell* in *Hooper* v. *Lane* (1) on this subject are very instructive. Now what is the wrong here? A breach of contract to register the agreement. Can a company excuse itself from doing its duty in enforcing payment in cash, by agreeing to register a contract which makes such payment unnecessary? If it can do so the section is reduced to a nullity. If a company cannot contract to take something else than money, how can it hamper itself by a contract not to sue for the money? In the present case there is no contract not to sue, but only a contract to register the agreement, a contract which cannot be pleaded in bar to an action.

To return to the maxim that a man cannot take advantage of his own wrong, we can see the point where it ceases to be applicable. Construing the maxim as I have said, the first question is, has the right to demand payment in cash been acquired through the breach of contract in question? Was it through non-registration of the contract that the liability to pay in cash arose? In my opinion it was not: the liability arose from taking the shares, although such liability might have been avoided in the one way pointed out by the section.

Molton v. *Camroux* (2), which must be read together with *Davis* v. *Bryan* (3), was quite a different case. The action was by the legal personal representative of a person who had bought and paid for two annuities, to recover the amount so paid. The statute had said that the grant of the annuities should be void unless enrolled. The Court held that this meant voidable. But the annuitant had never complained, and the Court only meant that under the peculiar circumstances of that case his representatives could not take advantage of his default in not having enrolled

(1) 6 H. L. C. 443, 460, 461. (2) 2 Ex. 487; 4 Ex. 17.
(3) 6 B. & C. 651.

the grant of the annuities. Here there has been a breach of contract by the company but the right to enforce payment of calls does not arise from that breach. Even if it did, I doubt whether the maxim would apply. You cannot sue a person whom you have wronged, for a demand arising out of the wrong, but that rule does not apply in favour of transferees, unless they have by special agreement been clothed with all the rights and cross demands of the transferors. Again, the maxim cannot be applied so as to defeat rights which have subsequently arisen, and here, as the shareholders can neither get off the register nor prove against the company, I think the winding-up would be an answer to their case.

FRY, L.J.:—

My learned Brethren have discussed this case so fully that I shall be very brief. The 25th section appears to me fatal to the case of the Appellants. It was passed for the benefit of the creditors of the company, and the company cannot contract itself out of it except in the authorized way. Every share is to be held subject to the payment of the full amount in cash, unless there is a registered agreement to the contrary—no covenant not to sue, no accord and satisfaction, no agreement to register a contract will suffice. The argument, therefore, that the company is precluded from suing because of the agreement to register fails. If we were to give effect to the Appellants' argument we should do away with the beneficial effect of the section. The intention of the Legislature was to give no effect to anything short of a registered contract, and I doubt whether any action could be maintained against the company for breach of an agreement to register it. *Waterhouse* v. *Jamieson* (1) and *Burkinshaw* v. *Nicolls* (2) merely decided that in those cases the company as a matter of evidence was estopped from denying that the shares had been paid up in cash. In the present case there are no facts whatever from which it can be inferred that either of the Appellants believed the shares he took to have been paid up in cash, and neither of them says that he did so. They say that they believed the agreement to have been registered, but that is

(1) Law Rep. 2 H. L., Sc. 29. (2) 3 App. Cas. 1004.

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nothing to the purpose. They, therefore, cannot claim the benefit of estoppel. I share the doubts of Lord Justice *Cotton* as to whether there was any valid agreement in writing at all.

Solicitor for Appellants: *Edward Lee.*
Solicitors for Liquidator: *Lindo & Co.*

H. C. J.

C. A. 1888 *June* 11.

In re DARLING (A Person of Unsound Mind).

Lunacy—Surplus Income of Lunatic—Allowance to Collaterals.

It is not the duty of the Court to deal benevolently or charitably with the property of a lunatic, and applications for allowances out of the surplus income of a lunatic to poor collateral relations who have no legal claims upon him for provision are to be discouraged.

A lunatic, eighty-two years of age, whose next of kin were ten cousins, had, while sane, made small allowances to three of them, and after he was found of unsound mind those allowances were continued by the Court. By his report the Master recommended that weekly allowances of a larger amount should be made to these three cousins, and that weekly allowances should also be made to three others of the lunatic's cousins. There was evidence that all these persons were in very poor circumstances, and that some of them had difficulty in obtaining the necessaries of life, and that after payment of the proposed allowances there would still be a surplus income of £545 per annum.

Upon an application by the committee that these allowances might be sanctioned by the Court:—

Held, that there being nothing to shew that the lunatic would have done what the Court was asked to sanction, the mere fact that these collaterals were in humble circumstances and had difficulty in providing themselves with necessaries was not sufficient to justify the Court in granting the application, and that it must be refused.

THE lunatic in this matter was a bachelor of eighty-two years of age, whose next of kin were six cousins *ex parte paternâ*, and four cousins *ex parte maternâ*. When sane he had been in the habit of making small allowances to three of those cousins, who were in humble circumstances, viz., *Ann Darling*, *Mary West*, and *Elizabeth Holmes*, and, by his certificate, the Master found that he had thus annually allowed *Ann Darling*, £2 10*s.*, and *Mary West*, £4, and that he had made *Elizabeth Holmes* occasional presents averaging about £8 a year. By an order made upon this

certificate on the 12th of December, 1887, it was directed that these allowances should be continued until further order.

The net income of the lunatic was £1647 per annum; the annual allowance for his maintenance was £790 per annum, and in a recent report the Master in Lunacy had recommended that the allowances continued to the three cousins above mentioned should be increased, so as to give *Ann Darling*, *Mary West*, and *Elizabeth Holmes* each a weekly allowance of 15*s.*, and that further weekly allowances should be made to three other cousins of the testator, viz., 15*s.* to *Sarah Tomlinson*, the sister of *Mary West*, 30*s.* to *George Field*, and 30*s.* to *Philip Darling*.

There was evidence that *Ann Darling* was a widow living with and supported by her daughter, who was herself a widow with three children, in poor circumstances, and supporting herself by keeping a small shop; that *Elizabeth Holmes* was a widow without means, and unable to earn a livelihood, and dependent for maintenance upon a cousin who was a cottager; that *Mary West* and *Sarah Tomlinson* were sisters, occupying a very small house in a very poor locality, where they kept a shop, by which they would probably make 6*s.* or 7*s.* a week; that *George Field* was eighty years of age and dependent upon a daughter who had great difficulty in obtaining for herself and him the common necessaries of life; and that *Philip Darling* was in a most impecunious position.

These new and increased allowances would amount altogether to £312 per annum, and after making them there would still be a surplus income of £545 per annum.

An application was now made by the committee of the lunatic asking that the sum of £312 might be paid to him out of the income, and that thereout he might be at liberty to pay the increased and new allowances above mentioned, and so recommended by the Master.

Edward Ford, in support of the application:—

The application is to increase certain allowances made by the lunatic while sane, and to make certain further allowances to other persons in the same degree. *Primâ facie* all the persons who are next of kin now will be his next of kin at the time of his death.

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There is a large surplus income, and all the next of kin join in this application. The Court has frequently, in the exercise of its discretion, made allowances to collaterals in indigent circumstances upon the principle of doing for the lunatic's relations what he himself would have done if sane: *Ex parte Whitbread* (1); *In re Croft* (2).

It is true that in *In re Evans* (3) the Court declined to sanction an allowance to poor relations of the lunatic, but there was opposition in that case and there is none here.

[FRY, L.J.:—Is there any evidence that the lunatic whilst sane took an interest in these persons.]

No other evidence than that he made small allowances to three of them.

Decimus Sturges, for the next of kin; *Mary West* and *Sarah Ann Tomlinson* having general liberty to attend:—

I support this application, not on the ground of charity towards the poor relations of the lunatic, but on the ground taken in *In re Croft* (4), that the Court should do for the lunatic that which he, if of sound mind, ought to do, and would do for himself. In *In re Sparrow* (5) the Court sanctioned an allowance of £500 per annum to a nephew who was tenant in tail in remainder after the lunatic although there was opposition on the part of some of the next of kin. That was no doubt the case of a successor, but here there is no opposition, and the lunatic has himself recognised the duty of providing to some extent for three of these poor people, who are his only relatives, which brings the case within *In re Frost* (6).

[He also referred to *In re Blair* (7) and *Pope* on Lunacy (8).]

COTTON, L.J.:—

This is an application to the Master which has been adjourned into Court.

The question we have to deal with is whether the Master is

(1) 2 Mer. 99.
(2) 32 L. J. (Ch.) 481; 1 N. R. 185.
(3) 21 Ch. D. 297.
(4) 32 L. J. (Ch.) 481.
(5) 20 Ch. D. 320.
(6) Law Rep. 5 Ch. 699.
(7) 1 My. & Cr. 300.
(8) Page 141.

right in recommending an allowance of certain sums amounting to £312 a year to be made in favour of certain cousins of the lunatic.

I cannot accede to the view taken by the Master, who has recommended that these allowances should be made. We are appointed to protect and to administer for his benefit the property of the lunatic. Undoubtedly we do sometimes make considerable allowances for persons who have legal claims upon a lunatic, such as a son or a daughter, and also for persons who have moral claims upon him. But it is not our business to deal benevolently or charitably with the property of the lunatic, and in my opinion it would be wrong for us to do so. Applications for allowances of this kind ought to be discouraged rather than encouraged. The cases referred to, however, do shew that the Court has sometimes made an allowance to collaterals.

I pass over those cases in which an allowance has been made by the Court in favour of a person who is the next successor to the lunatic's estate, for it is the interest of every possessor of an estate that his successor should be educated and brought up in such a manner as to enable him to fulfil the duties attaching to the ownership of the estate, and where the successor is in such a position as not to be able to obtain an education suitable to his prospects, the Court will, no doubt, make an allowance, and sometimes has made a very considerable one.

Here the lunatic had several cousins, who happen to be his next of kin, and while sane he made small allowances to some of them; and the Court, acting on the principle that the Court will do for the lunatic what the lunatic would have done himself if of sound mind, has continued these allowances.

But we are now asked to sanction an increase of the allowance to some of these persons, and also to sanction further allowances to others of them. Now to make such an order would, in my opinion, be contrary to the principles on which the Court acts in administering the property of a lunatic.

The case of *In re Croft* (1), before Lord Justice *Knight Bruce* and Lord Justice *Turner*, shews the danger of making such an order, even coupled with the intimation that it is not to be drawn into a precedent. The Lords Justices thought that the very

(1) 32 L. J. (Ch.) 481.

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special circumstances of that case justified them in making an order. Of course all the details of the evidence cannot be set out in a report, but I think we do find that in that case there were very special circumstances. The applicant, who was one of the two only next of kin of the lunatic was in want of food and clothing, and there was no public provision for the poor in *Wurtemberg*, where he was residing. The Lords Justices thought that under the peculiar and pressing circumstances of the case they might make an allowance to him, although he was a collateral. Here these persons are in a humble state of life, and may have a difficulty in providing themselves with necessaries; but that alone will not justify us in making an allowance. It is said that the lunatic if sane would probably have made the allowance now asked for; but I do not come to the conclusion from the evidence that the lunatic would have done so. There was a case here before us, I think between one and two years ago, where I and another Lord Justice dealt fully with the question, and considered the authorities from Lord *Cottenham's* time, and if it had been necessary I should have liked this case to stand over in order to give us an opportunity of consulting the authorities; but in *In re Evans* (1) the late Master of the Rolls and Lord Justice *Lindley* have laid down the principles on which the Court acts, and it is therefore not necessary to deal further with the authorities. There there was opposition, but in these cases the Court looks very carefully into the interest of the lunatic, and the fact of opposition or consent has no effect at all upon the case except to call the attention of the Court to the authorities. We think that these allowances ought not to be made. We cannot allow the costs of this application.

BOWEN, L.J.:—

I am of the same opinion. The Court has always considered that its jurisdiction to make allowances to collaterals ought to be exercised with the utmost jealousy. The case of successors to property depends on a different principle. But in cases of collaterals who are not successors, the Court ought only to do that which the lunatic would have done himself if he had been of

(1) 21 Ch. D. 297.

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sound mind. If it could be shewn that the lunatic would have done that which we are asked to do, that would be a different matter. In my opinion the evidence falls short of doing that. If we made these allowances, it would be making the lunacy of one member of the family a windfall to the others.

FRY, L.J.:—

I entirely agree. It appears from all the cases, from *Ex parte Whitbread* (1) downwards, that what the Judge has to consider is this. He has to see what it is likely the lunatic himself would do if sane. In the present case I am by no means satisfied that, if the lunatic were of sound mind, he would have made any further allowances to these relatives.

Solicitors: *J. W. Sykes*, for *Burton & Eking, Nottingham; Vincent & Vincent.*

W. W. K.

LAWRANCE *v.* LORD NORREYS.

C. A. 1888 STIRLING, J. *April* 13, 14; *May* 11, 18. C. A. *June* 15

[1887. L 4193.]

Striking out Statement of Claim—Frivolous and oppressive Action—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *s.* 26 [*Revised Ed. Statutes, vol. vii., p.* 393]—*Concealed Fraud.*

The Plaintiff sued in the Chancery Division to recover estates as heir-at-law of *J. L.*, who died intestate, seised in fee and in possession thereof, in 1816. The Plaintiff alleged that on *J. L.'s* death *J. T.* wrongfully took possession; that the solicitors of *J. L.* knew the address of the heir-at-law, who resided in *America*, and were about to communicate with him, but that *J. T.* persuaded them not to do so, and to deliver to him the deeds and evidence shewing *J. L.'s* title, including a deed of compromise by virtue of which he had obtained possession; that by reason of the premises the heir and the persons claiming under him had remained ignorant of their title till 1886, and that the fraud could not with reasonable diligence have been discovered sooner.

The Plaintiff had previously commenced an action in the Queen's Bench Division to recover the same estates, the statement of claim in which merely alleged his title as heir-at-law, but contained no allegations of fraud to take the case out of the *Statute of Limitations*. The Defendants applied

(1) 2 Mer. 99.

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to strike it out, as shewing no cause of action. The Plaintiff then, after the regular time for amendment, applied for leave to amend, and exhibited a proposed amended statement of claim containing allegations of concealed fraud. The Queen's Bench Division refused leave to amend, and struck out the statement of claim and dismissed the action, on the ground that no cause of action was shewn. The Plaintiff then commenced this action in the Chancery Division, the allegations of fraud in the statement of claim being nearly the same as those in the proposed amendments in the Queen's Bench Division, but meeting some of the points in which those amendments had been observed upon by the Judges as defective. The Defendants moved that the statement of claim might be struck out and the action dismissed:—

Held by *Stirling*, J., that the inducing the solicitors to deliver the deeds to *J. T.* was a concealed fraud, which would prevent the operation of the statute, and that, the Court not being satisfied on the evidence that the allegations of fraud were fictitious, the action must be allowed to proceed:

Held by the Court of Appeal that, independently of the General Orders, the Court has jurisdiction to stay vexatious actions; that the conclusion to be drawn from the whole of the materials before the Court was that the allegations of fraud were made without any reasonable ground, and that the statement of claim, assuming its allegations if true to shew a cause of action, ought to be struck out and the action dismissed as an abuse of the process of the Court.

THE statement of claim in this action commenced in December, 1887, in the Chancery Division, to which Lord *Norreys*, Lord *Abingdon*, Lady *O'Hagan*, and Lady *Emily Lennox*, were Defendants, alleged (1) that the Plaintiff is entitled to the possession of certain estates therein specified, situate in *Lancashire*, *Yorkshire*, and *Durham*; (2) that *Richard Towneley* was seised in fee and in possession of those estates, and died so seised and possessed in 1706; (3) that the premises are now vested in the Plaintiff as the heir-at-law of *Richard Towneley*. Alternatively (4), that *Jonathan Lawrance* the younger was seised in fee and in possession of the premises, and died so seised and possessed in 1816; (5) that the premises were now vested in the Plaintiff as the heir-at-law of *Jonathan Lawrance* the younger. The Plaintiff then (6) traced the heirship from *Richard Towneley* to *Jonathan Lawrance* the younger, who died in 1816, and whose eldest son was *Lebius Lawrance*, who died in 1818, and then through *Lebius Lawrance* to the Plaintiff, whose father died in 1884. He alleged that his ancestors named in the pedigree, who were eight in all, died intestate. He then proceeded to allege—

(7.) "Upon the death of *Jonathan Lawrance* the younger *John Towneley* wrongfully took possession of the premises in paragraph 1."

(8.) "The said *Lebius Lawrance*, and the persons deriving title through him, have been deprived of the premises by means of the fraud of the said *John Towneley*, which was concealed from the said *Lebius Lawrance* and the persons deriving title through or under him. The following are the particulars:—

A. *Jonathan Lawrance* the younger was for many years, and until shortly before his death, out of possession of the said premises. He came from *America* (where he resided) to *England*, for the purpose of establishing his title to the premises, and brought an action or actions for the recovery of the possession thereof, and partly by means of such actions, and partly under or by virtue of a deed of compromise to which the said *John Towneley* was a party, he recovered possession of the premises.

B. *Jonathan Lawrance* the younger died in 1816 intestate, seised of the premises in fee simple, and also possessed of divers documents constituting the evidence of his title to the premises, including divers certificates proving the pedigree stated in paragraph 6, so far as the same then existed, and also the said deed of compromise.

C. *Lebius Lawrance* was the eldest son and heir-at-law of *Jonathan Lawrance*.

D. At the time of the death of *Jonathan Lawrance* the younger, *Lebius Lawrance* was resident in the *United States of America*, and was ignorant of the said actions and of the said compromise, and that *Jonathan Lawrance* the younger had recovered possession of the premises, and of his death, and that he died intestate, and that he was entitled to the said premises, and that he was seised thereof at the time of his death, and that he was in possession thereof, and that he was possessed of the said documents and evidences of title.

E. The solicitors in *England* of the said *Jonathan Lawrance* the younger, who had been employed by him in and about the said actions, compromise, and other proceedings mentioned in subparagraph A, and who were employed by him as his solicitors in all matters connected with the *Towneley* estates down to and at

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the time of his death, were aware of all the facts mentioned in sub-paragraphs A to D, both inclusive, and were also acquainted with the address in *America* of the said *Lebius Lawrance*, and intended and were about to communicate to the said *Lebius Lawrance* the facts mentioned in sub-paragraphs A and B; but the said *John Towneley* fraudulently, and with intent to deprive the said *Lebius Lawrance* of the said premises, induced and procured such solicitors not to communicate, and in fact they did not communicate, the said facts to the said *Lebius Lawrance*; but to conceal, and they did in breach of their duty to the said *Lebius Lawrance* and the said *Jonathan Lawrance* the younger conceal, from the said *Lebius Lawrance* the said facts, and that the said *Lebius Lawrance* had become entitled to the said premises as the heir-at-law of the said *Jonathan Lawrance* the younger. By reason thereof the said *Lebius Lawrance* remained ignorant of the said facts.

F. At the time of the death of *Jonathan Lawrance* the younger the documents and evidences of title mentioned in sub-paragraph B were in the possession of the solicitors mentioned in sub-paragraph E as the solicitors for the said *Jonathan Lawrance* the younger, upon whose death the said *Lebius Lawrance* became entitled to the same; but the said *John Towneley* fraudulently, and with such intent as aforesaid, induced and procured the said solicitors to deliver to him, and they did in breach of their duty as aforesaid deliver to him, the said documents and evidences, including the said certificates and deed of compromise then belonging to the said *Lebius Lawrance*, and the said *John Towneley* thereupon fraudulently and with such intent as aforesaid destroyed the same."

G related to the alleged fraudulent destruction of a tombstone.

"H. By reason of the premises the said *Lebius Lawrance* and the persons claiming under him, and mentioned in paragraph 6, remained ignorant of their title to the said premises until the year 1886."

The Plaintiff then proceeded to allege that the Defendants were wrongfully in possession of the premises, and that they derived their title under *John Towneley*, but not under any *bonâ fide*

purchase for valuable consideration; that the Plaintiff did not discover the fraud till 1886, and that it could not with reasonable diligence have been discovered sooner. The Plaintiff claimed to recover possession of such parts of the premises as were in the possession of the Defendants, to establish his title to such parts as were in possession of their tenants, an account of rents, and a receiver.

On the 9th of June, 1886, the Plaintiff had commenced his action in the Queen's Bench Division against Lord *Norreys* alone to recover the above estates and certain other estates. So far as related to the estates now in question the statement of claim, after statements identical with those of the first six paragraphs of the statement of claim in 1887, simply alleged that the Defendant had wrongfully taken possession of the premises. The Plaintiff claimed the same relief as was asked in the later action.

In October, 1886, Lord *Abingdon* was added as Defendant.

On the 29th of October, 1886, Lord *Norreys* and Lord *Abingdon* took out a summons for the Plaintiff to shew cause why the statement of claim should not be struck out, or the action stayed or dismissed, on the ground that it disclosed no reasonable cause of action, and that the action was shewn by the statement of claim to be frivolous and vexatious.

On the 30th of October the Baroness *O'Hagan* and Lady *Emily Lennox* were added as parties.

The summons came on before the Master, and it was urged that the Plaintiff's claim was barred by the *Statute of Limitations*. The Master referred it to the Judge, who referred it to the Divisional Court, and on the 6th of November, 1886, a notice of motion to the same effect as the summons was served. On the 22nd of November the Plaintiff took out a summons for leave to amend his statement of claim. The Master on the 29th of November adjourned this summons that the Plaintiff might furnish a copy of the proposed amendment. An amended statement of claim was accordingly furnished, which was very similar to the subsequent statement of claim in the action of 1887; but the allegations in paragraph 8 were not so fully developed. They contained no statement as to the action by *Jonathan Lawrance* or as to the deed of compromise, but only that he died in 1816

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intestate seised in fee simple and in possession of the property, and also possessed of divers documents constituting the evidence of his title. There was no statement that the solicitors of *Jonathan Lawrance* knew anything about *Lebius Lawrance*.

The Defendants' application to strike out the statement of claim and the Plaintiff's application for leave to amend were heard together before Lord *Coleridge* and Mr. Justice *Day* on the 17th and 24th of June, 1887. There was no evidence as to the truth of the matters proposed to be introduced by amendment, nor was any explanation given why there was no allegation of fraud in the original statement of claim. The Court noticed the vagueness of the allegation as to the evidences of title in the possession of *Jonathan Lawrance*, the absence of any allegation that the solicitors knew anything about *Lebius Lawrance*, and the fact that the solicitors were not named. The solicitors were dead, but it was stated that a Mr. *Richardson*, who had been in their office, was living, and had been seen by a person to whom he had made a statement as to the fraud.

The Court considered that no case had been made to induce it to allow the amendment after the regular time for amending had expired. The application for leave to amend was refused, and the action dismissed.

In December, 1887, the present action was commenced in the Chancery Division.

The Defendants severally moved that the statement of claim might be struck out on the ground that it disclosed no reasonable cause of action, and that the action, being frivolous and vexatious, might be dismissed with costs.

The case came on before Mr. Justice *Stirling*, who, after it had been opened, adjourned it that evidence might be given why the allegations of fraud had not been made at first, and as to the ground for making them.

J. F. Jaques, a retired Colonel in the American army, deposed that he had been formerly employed as the agent and attorney of the Plaintiff's father for the purpose of collecting proofs of his title to the estates, and that since the death of the father in 1884 he had acted as attorney and agent of the Plaintiff for the purpose of establishing his title to the estates. That he was first

employed by the father in 1879, and went on collecting proofs till 1885. He went on to say, "In the year 1885 I finally succeeded in obtaining what I believe to be conclusive proofs of the facts alleged in clauses A, B, E, and F of the 8th paragraph of the statement of claim in this action." In a subsequent paragraph he deposed that from the facts ascertained by him personally, and from facts ascertained by other persons who had been engaged from time to time in investigating the title to the estates, he firmly and sincerely believed that the allegations in paragraph 8 and every of them were true, and that the same would be proved at the trial. He gave as the reason for commencing that action without any allegation of fraud that he had come to the conclusion that the fraud need not be mentioned in the pleadings unless the Defendants pleaded the *Statute of Limitations*, and that then the fraud could be alleged. He stated that he was desirous not to communicate more facts than he considered necessary, as he had reason to believe that solicitors whom he had formerly instructed to act for the Plaintiff had communicated to the then solicitors of the Defendants particulars which he had stated to them as to the fraud, and that such information had been used to the prejudice of the Plaintiff.

The motions came on for hearing before Mr. Justice *Stirling* on the 13th of April, 1888.

Rigby, Q.C., and *Trevelyan*, for Lord *Norreys* and Lord *Abingdon*:—

Independently of the General Rules and Orders, Order XXV., rule 4, the Court has inherent jurisdiction to dismiss an action as frivolous and vexatious on the ground of its being an abuse of the process of the Court: *Metropolitan Bank* v. *Pooley* (1). Under the old practice such a statement of claim as this would have been demurrable: *Munday* v. *Knight* (2); *Bainbrigge* v. *Moss* (3); *Philipps* v. *Philipps* (4); *Irvine* v. *Kirkpatrick* (5). There is nothing to induce the Court to suppose that there is any foundation for the allegations relating to fraud. The case was fully

(1) 10 App. Cas. 210.
(2) 3 Hare, 497.
(3) 3 Jur. (N.S.) 58.
(4) 4 Q. B. D. 127.
(5) 7 Bell App. (H.L.) 186, 217.

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considered in the Queen's Bench Division, and the Court was of opinion that on the statement of claim as amended the Plaintiff could not succeed. They, therefore, refused leave to make the amendments.

Hastings, Q.C., and *W. C. Druce*, for Lady *O'Hagan*.

F. C. Norton, for Lady *Emily Lennox*.

W. Pearson, Q.C., and *Upjohn*, for the Plaintiff:—

So far as Order XXV. is concerned it must be shewn by the pleadings that the action is frivolous and vexatious. The Court has nothing to do with the probability or improbability of the Plaintiff being able to prove the facts alleged, or as to the probable result of the action: *Vane* v. *Vane* (1); *Boaler* v. *Holder* (2). The statement of claim contains allegations shewing a title as heir-at-law and facts which take the case out of the *Statute of Limitations*. It is not sufficient to charge fraud generally, but the Plaintiff must state sufficient facts from which the Court can infer a fraudulent intention. The allegations of fraud are specific enough to give the Plaintiff the benefit of sect. 26 of that statute (3 & 4 Will. 4, c. 27). The alleged fraud, which was concealed, could not with reasonable diligence have been discovered before 1886: *Petre* v. *Petre* (3); *Munday* v. *Knight* (4).

There is no rule which requires the Plaintiff to state the terms of the deed of compromise which it is averred was entered into. The Plaintiff residing in *America* was absolutely ignorant of his title to the estates and of all that had taken place in *England* in reference to the fraudulent transactions in regard to them. Another averment was that certain solicitors in *England* had in their possession evidence of title. Their legal duty was, holding them as bailees for him, to hand them over to *Lebius Lawrance*. But they fraudulently did not communicate the facts to him and the documents got into the custody of the Defendants' predecessors, who obtained wrongful possession of the estates. That was as complete a case of fraud as could well be conceived. The averment as to the tombstone shews a concealed fraud against

(1) Law Rep. 8 Ch. 383.
(2) 54 L. T. (N.S.) 298.
(3) 1 Drew. 371, 397.
(4) 3 Hare, 497.

the person who had a right to sue. The pleadings shew that the Plaintiff did not discover the fraud until 1886 and that he could not obtain knowledge of it sooner, and he should be allowed to proceed with his action. The evidence shews ground for making the allegations of fraud, and they are sufficient to take the case out of the statute: *Gibbs* v. *Guild* (1).

The pleadings shew a reasonable cause of action, and call upon the Defendants to put in their defence. The motions should be refused.

[The cases of *Marchioness of Londonderry* v. *Baker* (2); *Hunter* v. *Stewart* (3), were also referred to.]

Rigby, in reply.

STIRLING, J.:—

I am not able to agree with Mr. *Rigby* as to the effect of the decision of the Queen's Bench Divisional Court. I consider that that case was decided simply upon the state of facts which was then before the Court, and their Lordships would not allow a certain amendment to be made, not being satisfied as to the truth and substantiality of the amendment; and I think that I am now brought face to face with the question, which it appears to me the Queen's Bench Divisional Court did not decide, namely, whether, supposing the allegations in the statement of claim be true, the Plaintiff has really got a case upon which he can succeed in this action.

Certainly the case which is stated in the statement of claim is a remarkable one. It is this,—that the Plaintiff is entitled to the possession of certain estates in the county of *Lancaster* and elsewhere; that *Richard Towneley* was seised in fee and in possession of the premises, and died so seised and possessed in 1706; that the premises are now vested in the Plaintiff as the heir-at-law of *Richard Towneley*. So that he claims as heir-at-law of *Richard Towneley*, who died seised of the estates in 1706. Then the statement of claim sets out an alternative case—that *Jonathan Lawrance* the younger was seised in fee and in posses-

(1) 8 Q. B. D. 296; 9 Q. B. D. 59. (2) 3 D. F. & J. 701.
(3) 4 D. F. & J. 168.

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sion of the premises, and died so seised and possessed in 1816, and that the Plaintiff is entitled as his heir-at-law. Then there are given the particulars of the Plaintiff's pedigree, and the Plaintiff alleges that upon the death of *Jonathan Lawrance* the younger in 1816, *John Towneley* wrongfully took possession of the premises. Therefore, the case which *primâ facie* the Plaintiff alleges, is one, in which he and his predecessors in title have been out of possession since 1816; and not merely their remedy, but their right to the estates is altogether gone by virtue of the *Statute of Limitations*. In order to get over the difficulty the Plaintiff proceeds to allege a case which (according to the contention on his behalf) is one of concealed fraud, viz., that *Jonathan Lawrance* the younger was for many years and until shortly before his death out of possession of the premises; that he came from *America* (where he resided) to *England* for the purpose of establishing his title to the premises, and brought an action or actions for the recovery of the possession thereof, and partly by means thereof, and partly under or by virtue of a deed of compromise to which he was a party, he recovered possession of the premises; that the said *Jonathan Lawrance* the younger died in the year 1816, intestate, seised of the premises in fee simple and in possession thereof, and also possessed of divers documents constituting the evidences of his title to the premises, including divers certificates proving the pedigree so far as the same then existed, and also the deed of compromise. So far, we have got this, that he died possessed, and that thereupon *John Towneley* wrongfully took possession of the premises. Then the Plaintiff states, that *Lebius Lawrance* was the eldest son and heir-at-law of *Jonathan Lawrance*, that at the time of the death of *Jonathan Lawrance* the younger, *Lebius Lawrance* was resident in the *United States of America* and was ignorant of the actions, and of the compromise; that *Jonathan Lawrance* had recovered possession of the premises, and of his death; that he was entitled to the premises; that he was seised thereof, and that he was possessed of the documents and evidences of title. Next come the paragraphs which alone, if at all, give rise to the question:—that the solicitors in *England* of *Jonathan Lawrance*, who had been employed by him in and about the actions, compromise and other proceedings mentioned,

and who were employed by him as his solicitors in all matters connected with the *Towneley* estates down to and at the time of his death, were aware of all the facts mentioned, and were also acquainted with the address in *America* of *Lebius Lawrance*, and intended and were about to communicate to him the facts mentioned, but *John Towneley* fraudulently, and with intent to deprive *Lebius Lawrance* of the premises, induced and procured such solicitors not to communicate, and in fact they did not communicate, the facts to *Lebius Lawrance*, but to conceal, and they did in breach of their duty to *Lebius Lawrance* and *Jonathan Lawrance* conceal, from *Lebius Lawrance* the facts, and that *Lebius Lawrance* had become entitled to the premises as the heir-at-law of *Jonathan Lawrance*. By reason thereof *Lebius Lawrance* remained ignorant of the facts.

Stopping there, I confess that as at present advised I do not think that a case of concealed fraud is made out. What *John Towneley* down to that time had done, was to take possession of the property, and he induced the solicitors not to tell *Lebius Lawrance* that he had done so. That, it seems to me, cannot be called a fraud, which, in the words of the statute, deprives the Plaintiff of his title, because, I take it, that is the nature of the fraud which is required to be made out. The Act states, "In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent, of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered." Therefore, what the Plaintiff has to make out is, a fraud by which he was deprived of the right which he claims. The mere fact that the solicitors were induced not to communicate with the heir-at-law, *Lebius Lawrance*, does not seem to me to amount to that. Then we come to the paragraph which states that, at the time of the death of the said *Jonathan Lawrance* the documents and evidences of title mentioned in sub-paragraph B were in the possession of the solicitors mentioned in sub-paragraph E as the solicitors of the said *Jonathan Lawrance*, upon whose death the said *Lebius Lawrance* became entitled to the same, but the said *John Towneley* fraudulently,

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and with such intent as aforesaid, induced and procured the said solicitors to deliver to him, and they did in breach of their duty as aforesaid deliver to him, the said documents and evidences, including the said certificates and deed of compromise then belonging to the said *Lebius Lawrance* and the said *John Towneley* thereupon fraudulently, and with such intent as aforesaid, destroyed the same. Now it is averred in the first division (A) of paragraph 8, that by means of the deed of compromise to which *John Towneley* was a party, he recovered possession of the premises; therefore, there is an allegation of the fact that *John Towneley* was in possession by virtue of the deed of compromise which he had got. Then there is an allegation in sub-paragraph F, that upon the death of *Jonathan Lawrance* the documents were in the possession of his solicitors, and that thereupon "*John Towneley* fraudulently, and with such intent as aforesaid,"—that is, with the intent to deprive *Lebius Lawrance* of the premises—"induced and procured the said solicitors to deliver to him, and they did, in breach of their duty as aforesaid, deliver to him the said documents and evidences, including the said certificates and deed of compromise then belonging to the said *Lebius Lawrance*, and the said *John Towneley* thereupon fraudulently and with such intent as aforesaid, destroyed the same." That is to say they, with the intent to deprive *Lebius Lawrance* of the possession of the property, combined, as it seems to me, with *John Towneley* deliberately to destroy the documents of title under which *Lebius Lawrance* was entitled. If that can be made out, it seems to fall within what Vice-Chancellor *Kindersley*, in the case of *Petre* v. *Petre* (1), said: "What is meant by concealed fraud? It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold." I think that the allegations amount to this; that with a view to deprive *Lebius Lawrance* of the right to which he was entitled, and to deprive him of the estates, *John Towneley* and his solicitors conspired together to destroy the deeds and to prevent *Lebius Lawrance's* title from being estab-

(1) 1 Drew. 397.

lished. Coming to that conclusion, it seems to me that the Plaintiff has alleged enough; and having come to that conclusion, I am not bound to go into the question of whether it is or is not probable that he will make out his case at the trial. That seems to me to be covered by what was said by Lord Justice *James* in the case of *Vane* v. *Vane* (1). Then I ought to add a word or two upon another subject, which weighed very much with me when the case was before me on a former occasion, that is, whether the whole of the allegations in the statement of claim are fictitious or not. Now, as to that, it is undoubtedly true that as a rule a plaintiff is allowed in this Court to state his case in the first instance without in any way verifying it by oath; and the Court ought to be slow, as I conceive, when a plaintiff *bonâ fide* brings forward a case, in shutting him out from stating it, and from trying it in the manner provided by law. No doubt the previous history of this case is very remarkable. There was an action brought in the Queen's Bench Division, and a statement of claim was delivered which contained none of the allegations set forth in paragraph 8. Then, upon that, there was a summons exactly the same as the present, taken out to strike out the statement of claim, and put an end to the action as being frivolous and vexatious. That was bound to succeed, because, on the statement of claim it appeared that the Plaintiff's title, whatever it was, was barred by the *Statute of Limitations*. Thereupon the Plaintiff applied for leave to amend, and he brought forward a statement of claim in draft, which does not differ very materially from that in the present case, and there is no doubt that in the argument that draft statement of claim was considered. But what the Queen's Bench Divisional Court decided was, that the statements which it was proposed to introduce by amendment were such that their Lordships wanted some *primâ facie* evidence that they were statements of a real case proposed to be tried by the Plaintiff, and were not purely and entirely fictitious. The Lord Chief Justice's judgment appears to me to shew that that was so. His Lordship said, "It is a remarkable circumstance certainly, that when all the circumstances were before learned counsel, and when, no doubt, every consideration

(1) Law Rep. 8 Ch. 383.

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that was thought to be material in the case was before him, the learned counsel should not have stated this, which is now the whole ground-work of the action, and without which the action, it is admitted, must fail. No explanation is offered how it came that a thoroughly competent counsel who was employed to draw the statement of claim omitted from it that which he is obliged to say now is the very foundation of the whole action. The thing is not done in a hurry; it is not done hastily and without consideration. Why it was omitted is not stated." I have now before me affidavits which trace the history of the preparation of the statement of claim, and supply the information which was not before the Queen's Bench Divisional Court, and the absence of which was one of the grounds on which their Lordships refused to allow the amendments to be made. Then the Lord Chief Justice proceeded to state the case which was proposed to be introduced by amendment, and said, "Before we admit an amendment in a statement of claim to be made, we should be satisfied that there is some sort of ground upon which the statement of claim should be amended, and should be allowed to proceed. Now what is the only suggestion which is now made by Mr. *Upjohn?*" Then his Lordship went on to deal with that, and he came to the conclusion that this statement, "whatever it was, is wholly insufficient, in my judgment, to warrant this Court, in the exercise of its discretion, in permitting an amendment of this kind, so as to turn a claim in its very nature and character shadowy into a claim, of which, after all, from what we know now, the utmost evidence which could be brought forward in the case is more shadowy still. I think the learned Judge who refused the amendment was perfectly right." Therefore, it seems to me, what their Lordships decided was, that there was nothing before them to convince them that these statements were otherwise than fictitious. When this motion was brought on before me, the proceedings in the Queen's Bench Divisional Court were verified by an affidavit. There was no affidavit filed on the part of the Plaintiff giving any further explanation than was given before that Court, and certainly, at the conclusion of Mr. *Pearson's* argument, I was under the impression that I was bound to treat all these allegations introduced into the statement of

claim, as mere fiction, there being no explanation given to the contrary with respect to them. It was stated by Mr. *Pearson* that he was prepared to give evidence shewing how the allegations were introduced. After a considerable lapse of time, evidence has been produced. It seems to me that it might have been given at an earlier period. However, I have now before me a statement of the history which led to the preparation of the statement of claim in the form in which it was delivered to the Queen's Bench Divisional Court in the first instance, and which explains how the allegations that are now relied upon came to be omitted, and I have also a statement by a gentleman who has acted as agent in tracing out this matter for a great number of years. He states that, "In the year 1885 I finally succeeded in obtaining what I believe to be conclusive proof of the facts alleged in clauses A, B, E and F of the 8th paragraph of statement of claim." I have also an affidavit of the solicitor verifying this statement, and stating that he believes it is *bonâ fide*. Now, on the simple question as to whether the allegations are made *bonâ fide* or are mere fictions, and as to whether I should shut out the Plaintiff from proving what he alleges to be his case, I think, there being nothing to the contrary beyond the evidence which was before the Queen's Bench Divisional Court, I ought not to hold, upon the present materials, that these allegations are so manifestly fictitious that I should treat them as an abuse of the process of the Court, and, therefore, dismiss the action as frivolous and vexatious. Coming to the conclusion at which I have arrived, that there is enough stated to entitle the Plaintiff to go to the trial of the action, I think the motions must be refused, but I refuse them without costs.

T. F. M.

C. A.

The Defendants appealed. The appeal was heard on the 15th of June, 1888.

Rigby, Q.C., and *Trevelyan*, for Lord *Norreys* and Lord *Abingdon*.

Hastings, Q.C., and *W. C. Druce*, for Lady *O'Hagan*.

Jeune, Q.C., and *F. C. Norton* for Lady *Emily Lennox*:—

The claim depends on the 26th section of the *Statute of Limita-*

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tions, being barred by the statute unless the Plaintiff can make out a concealed fraud. We say that the concealed fraud must be a fraud which deprives the Plaintiff of the estate, and that here nothing more is alleged than improper conduct, which did not deprive the Plaintiff of the property. The Plaintiff ought to make out that *John Towneley* acquired the estate by the fraud. If the documents alleged to have been handed over to *John Towneley* by the solicitors had been retained by them, it would have been all the same to the Plaintiff. There is no suggestion on the pleadings of any fraud which enabled *John Towneley* to enter and hold, and there is reason to believe that all the allegations made for the purpose of taking the case out of the *Statute of Limitations* are mere speculation. The solicitors were not the solicitors of *Lebius*, and did not owe any legal duty to him.

[FRY, L.J.:—If when the solicitor of a deceased owner is going to inform the rightful successor of his title, though it may not be his duty to do so, a person who knows himself to be wrongfully in possession asks the solicitor not to tell—is not that a fraud? *Petre* v. *Petre* (1).

BOWEN, L.J.:—If a person in possession gets somebody to hand him over documents which, as he knows, do not belong to him, but to another person whose title they would evidence—is not that a fraud?]

Suppose *A. B.* is wrongfully in possession, and *C. D.* says to him, "I know the heir-at-law and am going to tell him." *A. B.* then says, "Don't tell him," and *C. D.* complies—is that fraud? We say it is not. It is not fraud for a person who knows himself to be wrongfully in possession to give no information to the true owner, so how can it be a fraud for him to ask another person not to tell, or for that other person not to tell? Mere non-communication is not a fraud, unless there is an obligation to communicate.

[FRY, L.J.:—Suppose a person wrongfully in possession gets hold of and destroys a letter written by a third person to the true owner telling him the state of the title—is not that fraud?]

Yes, if the wrongful owner gets hold of the letter wrongfully,

(1) 1 Drew. 371.

but not if he says to the writer before the letter is posted "tear it up," and the writer does so. Under the old practice this statement of claim would have been demurrable: *Munday* v. *Knight* (1). It shews no such case as the Defendants can be called upon to meet.

The proceedings in the Queen's Bench Division throw light on the *bona fides* of the Plaintiff's claim. He commenced his action with a statement of claim merely stating his title as heir-at-law. An application was made to strike it out and dismiss the action. Then, after the time for amending had expired, the Plaintiff delivered an amended claim very similar to the present one, which we refused to accept. The Plaintiff then applied for leave to amend. The two motions came on together. The Divisional Court fully considered the nature of the amendments, refused leave to amend, and dismissed the action. The present statement of claim in some respects has been framed so as to meet points which were raised in the Queen's Bench Division, which is in itself suspicious. The Judges there dwelt on the fact that the solicitors who were alleged to be parties to the fraud were not named, and they have not yet been named. Mr. Justice *Stirling* gave an opportunity of adducing evidence as to the allegations of concealed fraud, and it has been adduced. We do not allege that Colonel *Jaques* does not believe what he has sworn to, but he does not state facts shewing that his opinion, which is all he has sworn to, is of any weight. This ought to be treated as a mere fishing action and dismissed as frivolous and vexatious: *Metropolitan Bank* v. *Pooley* (2); *Willis* v. *Earl Beauchamp* (3). If everything alleged in *Vane* v. *Vane* (4) had been proved, the plaintiff would clearly have been entitled to judgment, but that is not so here.

W. Pearson, Q.C., and *Upjohn* for the Plaintiff, were desired by the Court to address themselves first to the point whether the action was not to be treated as frivolous and vexatious:—

Such cases as *Metropolitan Bank* v. *Pooley* are quite distinct from this. The bankruptcy there was a fatal blot in the title of the plaintiff.

(1) 3 Hare, 497.
(2) 10 App. Cas. 210.
(3) 11 P. D. 59.
(4) Law Rep. 8 Ch. 383.

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[BOWEN, L.J.:—Why should not an action be dismissed as frivolous if founded on allegations which manifestly can never be proved?

COTTON, L.J.:—I should rather say allegations which are manifestly made without any foundation.]

We contend that the Court has nothing to do with the improbability that the case alleged will be proved: *Vane* v. *Vane* (1); *Boaler* v. *Holder* (2); *Johnston* v. *Johnston* (3). As to the proceedings in the Queen's Bench Division, the Court treated the application for leave to amend as being within the discretion of the Court, and did not think that a case had been made out for leave to amend, when the amendments introduced matter which it appeared highly improbable that the Plaintiff could prove.

[BOWEN, L.J.:—The Court would never have precluded the Plaintiff from amendment if it had thought he had a *bonâ fide* case.]

The Court went on the ground that a ground must be established for alleging fraud before an amendment alleging it could be allowed, and on the ground that there was no explanation why the allegation of fraud had not been introduced at first. This explanation had now been given, and Mr. Justice *Stirling* considered the explanation sufficient. To prevent a Plaintiff from bringing his case before the Court is a strong measure, which should not be resorted to except in an extreme case.

COTTON, L.J.:—

This is an application by way of appeal from Mr. Justice *Stirling* made to us on two grounds. First it is contended that, looking at the statement of claim and the allegations in it, it is what I may call demurrable, that is to say, states no case in law which would entitle the Plaintiff to relief. The second ground was that on the evidence which was before the Court, that is to say the circumstances together with the affidavit which has been made, we must treat this as a vexatious action, (I would

(1) Law Rep. 8 Ch. 383, 395. (2) 54 L. T. (N.S.) 298.
(3) 33 W. R. 239.

rather call it vexatious than frivolous, or frivolous and vexatious,) and ought to dismiss it on that ground. It is on that second point alone that we have called upon Mr. *Pearson*. I will, therefore, assume, without deciding it, that the statement of claim contains allegations sufficient to entitle the Plaintiff, if they were proved, to a judgment in his favour. But the jurisdiction of the Court to prevent its process being abused, and to prevent actions being brought which are mere vexation, is original and does not depend on the general orders of the Court. That jurisdiction is recognised by the House of Lords in *Metropolitan Bank* v. *Pooley* (1), a case which was relied on by Mr. *Pearson*, who said that the House of Lords held the question to be whether on the statements contained in the statement of claim there was any good ground of action. But undoubtedly, though they did consider that question, they did not limit the jurisdiction of the Court to cases where the pleadings shew no right of action in the Plaintiff. In my opinion this action is vexatious, and I say so on the ground that it is vexatious to bring Defendants into Court to answer a case founded on a fraud alleged to have been committed as long ago as 1816, when there is good reason for concluding that the allegations which prevent the statement of claim from being demurrable are made without any substantial ground, and arise only from the imagination of the person who instructs counsel to draw the statement of claim. That in my opinion is the proper result to be drawn from the facts which we have before us here. The Plaintiff has not, in my opinion, shewn that he has any reasonable ground for making those allegations of fraud, and the conclusion which I draw is, that they were made without any reasonable ground for making them.

Now if we had nothing before us but the statement of claim, I do not say that we should come to the same conclusion, extraordinary and improbable as its allegations are. But there has been another action in the Queen's Bench Division which, as first started, was an action simply stating that the person under whom the Plaintiff claims as heir-at-law was seised in fee, was in possession, and died intestate in the year 1816. Of course that was demurrable, as shewing no good ground of action, nothing

(1) 10 App. Cas. 210.

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being alleged to take the case out of the *Statute of Limitations*. A motion was made on behalf of the Defendants to put an end to the action on that ground. Then an application was made by the Plaintiff for leave to amend, and the proposed amendment brought the statement of claim into much the same form as the present statement of claim. But there is this remarkable fact—that there were wanting in the then proposed amendments certain allegations which are introduced into the present statement of claim, and which are intended to cure what the Judges of the Queen's Bench Division pointed out as blots in the then proposed amendments. The reasons given for not introducing these allegations in the first instance in the Queen's Bench action is, that the Colonel who is acting for the Plaintiff had reason to believe that his information, if he stated the grounds of fraud which he relied upon, would be communicated to the other side. He was, I think, unnecessarily timid in the matter. Then there is this further point. The principal allegation of fraud, and really the only one on which the Plaintiff can rely as taking the case out of the *Statute of Limitations*, is founded on dealings of a predecessor in title of the Defendants with a firm of solicitors, who are stated to have acted for an ancestor of the Plaintiff in an action which was brought by that ancestor. The Judges in the Queen's Bench Division pointed out that it was very extraordinary that this solicitor's name was not mentioned. Counsel then said that they could state that name. The Court of Queen's Bench did not allow the proposed amendments to be made, and dismissed the action on the ground that the unamended statement of claim shewed no good cause of action. It is true that the order made by them dismissing the action on the ground that the original statement of claim was not sufficient, is no judgment as regards what we have now before us, but I cannot dissociate from that order the refusal of leave to amend. If the Judges had thought that there was any reasonable ground for making those proposed amendments, they certainly would not have cut the case short by dismissing the action on the ground that the unamended statement of claim did not shew a good cause of action, but leave to amend would have been given, on proper terms as to costs and otherwise.

Now what has been done? We have an affidavit by the Colonel stating what he thinks will be sufficient to meet the present application. But, looking to what had taken place before, that affidavit satisfies me that there is no substantial ground for making these allegations of fraud. I asked during the argument where Colonel *Jaques* had shewn how he had got the information. The only answer was, that paragraph 4 of the Colonel's affidavit states: "In the year 1885 I finally succeeded in ascertaining what I took to be conclusive proof of the facts alleged in sub-clauses of A, B, E, and F of the 8th paragraph of the statement of claim in this action." He does not suggest that since the case came before the Queen's Bench Division he has discovered those new matters which are here introduced in order to obviate the defects pointed out by the Judges. He does not give us in his affidavit the names of the solicitors who are said to have committed this fraud, the want of which was treated by the Judges in the Queen's Bench Division as raising a great doubt whether there was any real foundation for these allegations. He nowhere refers in any way to *Richardson*, and in fact he tells us nothing whatever except that he believes that in 1885 he obtained conclusive evidence of the truth of these allegations.

Now at the time this matter came before the Queen's Bench Division it was known that the Plaintiff ought to put such allegations by amendment into his statement of claim as would take the case out of the *Statute of Limitations* by shewing a concealed fraud. Defects were pointed out in his proposed amendments, and those defects are now met by the introduction of allegations which are only the allegations of the pleader on instructions given to him by his client, but, though the giving the names of the solicitors was referred to by the Queen's Bench Division as a test whether the statements were based on anything or were merely imaginary, those names are not given. In my opinion this improbable story about a fraud alleged to have been committed in 1816 is brought forward without any reasonable grounds. If that is the proper conclusion of fact to be drawn from the evidence before us, then in my opinion this action is vexatious, and we ought to stop it as being an abuse of the process of the Court.

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BOWEN, L.J.:—

I am of the same opinion, and I should add nothing but for the fact that we are unfortunately differing from Mr. Justice *Stirling*.

The action appears to me to be vexatious and oppressive. It is an abuse of the process of the Court to prosecute in it any action which is so groundless that no reasonable person can possibly expect to obtain relief in it. An action may be stopped *in limine* if it is based upon a manifest legal absurdity. But it is suggested by Mr. *Pearson* and Mr. *Upjohn* that that is the limit of the powers of the Court, and that if there are allegations of fact, which if true would give a cause of action, then, however improbable they may be, the action must be allowed to proceed. I do not think there is any ground for that view. I have known many actions stayed which would have been maintainable if the allegations of fact, which were upon the face of them absurd and outrageous, could by any possibility be proved. I quite agree that this power ought to be exercised with the very greatest care, that it is not for the Court on a motion of this kind to discuss the probabilities of the case which is going to be made, except so far as to see whether the case stands outside the region of probability altogether, and becomes vexatious because it is impossible. In the present case it seems to me that the history of the allegations points unmistakeably in one direction. This is really an attempt to revive before another branch of the High Court of Justice an action which failed before the Queen's Bench Division. The action seeks to recover estates which for seventy years have gone in one line. It is at first launched with a simple declaration that the Plaintiff is the person entitled as heir-at-law, and it was deliberately so launched, that is to say, it was intended to reserve until later, if it was necessary later to make it, the averment that there was a concealed fraud which would take the case out of the *Statute of Limitations*. As soon as the point is taken that the *Statute of Limitations* is a bar to the claim, then and then only is put forward the allegation of personal fraud, committed, it is said, seventy years ago, and leave is asked to introduce it by amendment. The case comes before the Queen's Bench Division, who are asked to dismiss the action

upon the ground that the original statement of claim shews no ground of action. They have before them at the same time the proposed amendments which were intended to defeat the operation of the *Statute of Limitations* by putting forward the case of fraud. No Court ought to refuse leave to make such amendments if it saw any reasonable prospect, or, I may say, reasonable probability, that a case could be made of fraud which would defeat the statute—that there was any substance in the case, that it was not simply fiction and imagination. If there had been a miscarriage in the first instance on the part of the pleader by omitting to plead fraud, an affidavit might have said so, and explained how the statement of claim came to be launched in such a form, and it ought to have gone on to explain to the Court what the fraud alleged was, and how the Plaintiff came to think that there was ground for putting it forward. He would not have been expected to put forward the evidence in support of his case. No Court would have required him to do so, but the Court naturally would expect him to shew some ground for the faith that was in him, to satisfy them that the case of fraud was not a simple creation of his own imagination. But the Court pointed out during the argument blots in the proposed amendment of the statement of claim, and on the whole came to the conclusion that there was no ground for allowing the action to be prosecuted further. In fact they must have been satisfied that it was a hopeless action, and that there was no reasonable ground for prosecuting it.

It may be true, as Mr. *Upjohn* says, that the Court thought that at that stage, the original statement of claim having been filed in its actual form, the onus of proof lay on the Plaintiff to convince them that he had some ground for proceeding. The Court may have taken that view, but I venture to say that no Judge of the High Court of Justice would have allowed that action to be dismissed if he had thought there was any reasonable possibility of its succeeding.

Then what happens afterwards? No appeal is brought, and no attempt is made to come before this Court, strengthening the affidavits on the part of the Plaintiff and satisfying this Court that he had a reasonable hope of making a case in that action,

C. A. 1888 LAWRANCE v. LORD NORREYS. Bowen, L.J.

but he issues another writ and delivers a statement of claim almost exactly the same as the amended statement of claim which the Queen's Bench Division had refused to accept, altering it, however, in one or two particulars in which defects were pointed out by the Queen's Bench Division. But when the Plaintiff is attacked on the ground that this is only an attempt to revive the old litigation, then, at the eleventh hour, two affidavits are filed. These affidavits do not explain upon what ground the Plaintiff's advisers proceeded in making these fresh allegations which exactly touch the blots on which the Queen's Bench Division put its hand. Nor does Colonel *Jaques* or his solicitor give us any reason at all to think that they can by any possibility have a real ground for alleging that they have proof of this fraud which is said to have been committed seventy years ago. I do not say that Colonel *Jaques* does not believe that he has a case. I know by long experience that people persuade themselves that they or their friends have good cases in law when the cases are shadowy and hopeless. I do not say a word against his honour or his good faith, but I am satisfied that no reasonable man could on the materials before us consider this action anything but groundless. I think it would be wrong to allow an action of this sort to hang over the heads of the Defendants, an action which seems to me to contain all the elements of vexation and oppression.

FRY, L.J.:—

I am entirely of the same opinion, and I shall endeavour, I hope without any disrespect to the opinion of the learned Judge in the Court below, to express my agreement with my learned Brothers very shortly.

We have in the first place before us, the last edition of the Plaintiff's story, a story which seems to me highly improbable. I agree that if we were proceeding upon the suggestion that the pleadings do not disclose a cause of action, the improbability of the alleged facts would not be material, but when we are inquiring whether there are any reasonable grounds on which the Plaintiff can expect to succeed, I think that we are not only at liberty, but bound, to look at the probability or improbability of

the story upon which the Plaintiff relies. His story is a very extraordinary and very improbable, although a possible, story. Then in the next place we have the history of these pleadings. We have the evolution of the Plaintiff's claim in its struggle for existence, and we find it gradually growing up and developing, as the difficulties are pointed out by the Judges of the successive Courts before which it comes. The impression produced on my mind by that history is that we have here the evolution of a myth, and not a gradual unfolding of real facts. Then, lastly, we have the affidavits filed to inform the conscience of the Court as to the truth of the Plaintiff's story. Anything more shadowy, anything more unsatisfactory, anything more unlikely to produce persuasion or conviction on the mind of the Court I can scarcely imagine. Those affidavits, not only by what they do say but by what they do not say, confirm my conclusion that the Plaintiff has no reasonable ground for proceeding with this action.

COTTON, L.J.:—

The action will be dismissed on the ground that it is vexatious and oppressive. We do not act under Order XXV., rule 4, but on the ground that it is an abuse of the process of the Court.

Solicitor for Plaintiff: *Howell Thomas.*

Solicitors for Lord *Norreys* and Lord *Abingdon: Ward, Mills, Witham, & Lambert.*

Solicitors for Lady *O'Hagan: Markby, Wilde, & Johnson.*

Solicitors for Lady *E. Lennox: Norton, Rose, & Co.*

H. C. J.

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CHITTY, J.
Jan. 21.
C. A.
June 14, 15, 16, 18, 22.

UNION BANK OF LONDON *v.* KENT.

[1886 U. 72.]

Mortgage—Priority—Negligence—Possession of Title Deeds—Notice.

A company held land under a building agreement from the corporation of *London*, under which separate leases of the houses were to be granted as they were built. In April, 1883, the company borrowed money from the Plaintiffs, and covenanted to mortgage the houses to them by demise when the leases were granted, and that in the meantime the premises comprised in the building agreement should be a security to the Plaintiffs. The building agreement was handed over to the Plaintiffs, but no notice of their security was given to the corporation of *London*. In February, 1886, leases of two of the houses were granted to the company, and immediately afterwards the company deposited them by way of equitable mortgage with *B., J. & Co.*, who had no notice of the Plaintiffs' security :—

Held, by *Chitty*, J., that as the Plaintiffs were not by their mortgage deed entitled to intercept the legal estate, and as with regard to land priority does not depend on notice, their not giving notice to the corporation was no evidence of negligence, and that they were not to be postponed to *B. J. & Co.*

Held, by the Court of Appeal, that although the giving notice to the corporation would probably have prevented the handing over the leases to the company, still, as notice is not requisite to complete a security on real estate, the omission to give such notice was not a neglect of duty by the Plaintiffs on the ground of which they ought to be postponed to the subsequent equitable incumbrancers.

Per Fry, L.J. :—The cases where a prior equitable mortgagee has been postponed on the ground of negligence are cases where he has taken no steps although he knew that the mortgagor had made default in performing his obligations, and his omission to take such steps has enabled the mortgagor to commit a fraud; but no case decides that he is to be postponed because he has not taken precautions against a future default by a mortgagor who has not yet, to the knowledge of the mortgagee, been guilty of default.

BY indenture of the 17th of July, 1882, an agreement was made between the corporation of *London* by their agent and the *Land Development Association* (hereinafter called the company) that the company should erect certain houses and works on certain land of the corporation in accordance with plans and conditions therein mentioned, and the corporation covenanted with the company that as soon and as often as the company

should be entitled to demand according to the conditions to have a lease of any house granted to them or their nominees, the corporation would deliver to the company such lease duly executed by the corporation for the term of eighty years from Midsummer 1882, at the respective rents and in the form therein-mentioned.

By indenture of mortgage, dated the 30th of April, 1883, the company, in consideration of £9000 paid to them by *Richardson* and *Nelson*, covenanted for payment of principal and interest, and also covenanted that they would without delay take the steps necessary to entitle them to leases under the agreement of the 17th of July, 1882, and would procure such leases to be granted; and that, if when the same should have been granted any money should remain on the security of the present deed, they would immediately after the leases had been granted demise by way of mortgage the premises to be comprised in such leases to the mortgagees for the respective residues then to come of the terms of eighty years agreed to be granted to the company, and that in the meantime and until such leases should respectively have been granted, the premises comprised in the said agreement and the messuages or dwelling-houses to be erected should stand and be charged with the payment to the mortgagees of the £9000 and interest.

On the 29th of June, 1883, the company executed to *Nelson* a similar security for £1000, and by indenture of the 18th of September, 1883, *Nelson* transferred it to himself and *Richardson*. By indenture of the 22nd of May, 1885, *Richardson* and *Nelson* transferred these securities for £9000 and £1000 to the Defendant *Kent*.

On the 23rd of July, 1885, *Kent* borrowed from the *Union Bank* £6000, and deposited with them as security the indentures of the 17th of July, 1882, the 30th of April, 1883, the 29th of June, 1883, the 18th of September, 1883, and the 22nd of May, 1885. No notice of any of the above securities was given to the corporation.

On the 18th of February, 1886, the corporation, in pursuance of the building agreement, demised to the company two pieces of land, forming part of the property comprised in the agreement, for the term of eighty years from the 24th of January, 1882.

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The leases did not contain any reference to the agreement of July, 1882. On the 20th of February, 1886, the company deposited these leases with *Brown, Janson, & Co.*, as security for £1500 advanced by them to the company. *Brown, Janson, & Co.* had no notice of any of the incumbrances belonging to the bank.

In January, 1886, the *Union Bank* commenced this action against *Kent* and the company to enforce their security. Other persons were subsequently added as Defendants. Among them were *Brown, Janson, & Co.*, who by their defence alleged that no notice was ever given to the corporation by the Plaintiffs or by *Richardson*, or *Nelson*, or *Kent*, or the company, or by any other person, of any of the indentures of the 30th of April, 1883, the 29th of June, 1883, the 18th of September, 1883, and the 22nd of May, 1885, or of the deposit by *Kent*—that if any such notice had been given the two leases would not have been delivered to the company, nor would the company have obtained the advance of £1500 from *Brown, Janson, & Co.*, and that, by the neglect of the Plaintiffs or those through whom they claimed, to give any such notice, the company had been enabled to obtain from the corporation delivery of the leases, and to obtain the advance of £1500 from *Brown, Janson, & Co.*

An order for winding-up the company had been made on the 20th of April, 1886, and leave had been given to the Plaintiffs to proceed with the action so far as they sought relief against the mortgaged property.

The action came on for trial before Mr. Justice *Chitty*, on the 21st of January, 1888. The only point calling for report was the contest between the Plaintiffs and *Brown, Janson & Co.*

Maclean, Q.C., and *Ingpen*, for the Plaintiffs:—

Our mortgage being prior in date and there having been no negligence on our part we are entitled in priority over the Defendants *Brown, Janson, & Co.*: *Mumford* v. *Stohwasser* (1).

Romer, Q.C., and *R. C. Dobbs*, for *Brown, Janson, & Co.*:—

In order to perfect their security the Plaintiffs should have

(1) Law Rep. 18 Eq. 556.

given notice to the grantors of the building agreement, who in that case would have abstained from granting the lease. Not having given such notice, the Plaintiffs, though first mortgagees, must be postponed: *Layard* v. *Maud* (1).

Solomon, *Byrne*, and *Swan*, for other parties.

CHITTY, J.:—

In this case it would have been idle for the Plaintiffs to give notice to the corporation of *London* because their agreement of mortgage provided that their mortgagors should get the legal estate; that is to say, get the leases; and when those leases were granted then their mortgagors were to make a mortgage, by way of sub-demise; a thing that seems to have been forgotten, because mortgagees who intend to take a mortgage of leases do not take by way of assignment. They would not take a grant of a lease and be liable to the landlord; they would take under such an instrument by way of demise as would free them from that liability, and that is the true effect of this agreement. Then it contemplates, in direct terms, that the legal estate in the lease shall be conveyed to their mortgagors, consequently the non-giving of notice, which would have been a futile thing, cannot be any evidence of negligence against them, and that is the exact point, with a very slight difference in circumstances, which was decided in *Mumford* v. *Stohwasser* (2). In that case the person who obtained the judgment of the Master of the Rolls was equitably entitled to an underlease from a builder, who had entered into an agreement to build houses on land, with the right to have a building lease of the land granted to him. There, as here, the legal estate in the lease, of course, under that contract was to be granted to the mortgagor, the builder, and then he was, by way of sub-demise, to underlet the house. As it happened in *Mumford* v. *Stohwasser*, and as it has happened here, the builder takes the lease and thereby gets the legal estate, which, of course, puts him in the position of being able, by means of fraud, to convey away the legal estate. In fraud, I am sorry to say, he deposits two leases, when granted, with *Brown*,

(1) Law Rep. 4 Eq. 397. (2) Law Rep. 18 Eq. 556.

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Janson, & Co., the bankers, and they advance their money, but theirs is only an equitable title, and if they had chosen to take the legal estate without notice, if they had no notice, then there would have been an end of the matter. But they do not take the legal estate. It is only an equitable title, and then, the other equities being equal, priority of time prevails. That case was, I think, properly decided. I do not question that it was perfectly right, but whether right or wrong it binds me. It would be idle to say that this point was not argued. If they had thought it desirable to argue it, the Master of the Rolls himself would have seen the point, and the judgment is as clear as can be. This case is, as I have said, not distinguishable, because I am satisfied that both in this case and in that case—there by way of underlease, which was carving out the underlease for the benefit of *Mumford*, and here by way of underlease, which would have been the proper form of mortgage to the Plaintiffs, the *Union Bank*—the cases are exactly the same, I therefore declare the Plaintiffs to be entitled in priority to *Brown, Janson, & Co.*

Perhaps I ought to add that with regard to land priority does not depend upon notice. There may be cases of contract, and this is a sort of mixed case, in which you ought to give notice in order to prevent the legal estate from being conveyed away, but that is only in a case where you are entitled to intercept the legal estate, not in a case, as here, where you cannot intercept it.

F. G. A. W.

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Brown, Janson, & Co. appealed, and the appeal was argued on the 14th, 15th, 16th and 18th of June, 1888.

Romer, Q.C., and *R. C. Dobbs*, for the Appellants:—

This is a case where both the incumbrances are only equitable. It needs a very strong case to enable an equitable incumbrancer to prevail against a prior legal mortgagee. But where the contest is between equitable incumbrancers, the case stands quite differently, priority is given by time only where the equities in other respects are equal: *National Provincial Bank of England* v. *Jackson* (1); *Lloyd's Banking Company* v. *Jones* (2); *Layard* v.

(1) 33 Ch. D. 1. (2) 29 Ch. D. 221.

Maud (1) (which is very similar to the present case); *Bickerton* v. *Walker* (2). Here the equities are not equal, for if the Plaintiffs had given notice to the lessors the leases would not have been handed over as they were. It is, therefore, the negligence of the Plaintiffs which has enabled the lessee to commit the fraud. *Mumford* v. *Stohwasser* (3), relied on by Mr. Justice *Chitty*, does not govern this case, no question was argued there but constructive notice.

Maclean, Q.C., and *Ingpen*, for the Plaintiffs:—

Kent was *sub-modo*, at all events, a trustee for us. There is no such negligence, act, or omission, as to deprive us of our priority, and the decision of the Court below was right: *Mumford* v. *Stohwasser*; *Layard* v. *Maud*; *Rice* v. *Rice* (4); *Thorpe* v. *Holdsworth* (5); *Shaw* v. *Foster* (6). The question raised, whether there is any difference between the interest of the company under the building contract and their interest in the leases when granted, is covered by *Walsh* v. *Lonsdale* (7); *Maxfield* v. *Burton* (8); *National Provincial Bank of England* v. *Jackson* (9). To deprive us of our priority there must be some act on our part, or the omission to do something which we were under an obligation to do: *Rooper* v. *Harrison* (10); *Johnson* v. *Crédit Lyonnais Company* (11); *Roberts* v. *Croft* (12); *Shropshire Union Railways and Canal Company* v. *Reg.* (13); and Lord *Hatherley* (14) refers to *Cory* v. *Eyre* (15) as laying down the true principle. In *Newton* v. *Newton* (16) it was held that for an omission to cause postponement it must be an omission of a duty.

Romer, in reply:—

Layard v. *Maud* does not make against me. Some of the observations in *Rooper* v. *Harrison* if taken to the letter are

(1) Law Rep. 4 Eq. 397.
(2) 31 Ch. D. 151.
(3) Law Rep. 18 Eq. 556.
(4) 2 Drew. 73.
(5) Law Rep. 7 Eq. 139.
(6) Ibid. 5 H. L. 321.
(7) 21 Ch. D. 9.
(8) Law Rep. 17 Eq. 15.
(9) 33 Ch. D. 1.
(10) 2 K. & J. 86.
(11) 3 C. P. D. 32.
(12) 2 De G. & J. 1.
(13) Law Rep. 7 H. L. 496, 506.
(14) Ibid. 511.
(15) 1 D. J. & S. 149.
(16) Law Rep. 6 Eq. 135.

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against me, but they must be construed with reference to the circumstances of the case, for they are vaguely expressed. If it is meant to say that in order to postpone a prior equitable claimant there must be conduct on his part amounting to fraud, that is not law, for *National Provincial Bank of England* v. *Jackson* (1) clearly shews that the rule that nothing short of fraud will postpone a prior legal incumbrancer, does not apply as between equitable incumbrancers. The Plaintiffs here knew that leases might be granted at any moment, that they would then be handed over to the lessees, and that the possession of them would be *primâ facie* evidence of unincumbered ownership. The Plaintiffs had a right to underleases, and till the granting of them they had a charge on the property which entitled them to have the leases in their possession. Now a mortgagee clearly is bound to take reasonable care to get the title-deeds into his possession: *Rice* v. *Rice* (2); *Waldron* v. *Sloper* (3). The Plaintiffs, therefore, ought to be postponed to us.

1888. June 22. COTTON, L.J.:—

This is an appeal by the owners of an equitable mortgage, who claim priority over another equitable mortgage prior in date. The Plaintiffs are the assignees of a mortgage under the following circumstances:—A company obtained an agreement from the corporation of the city of *London*, to grant them building leases of a certain piece of land. The company were to erect houses on the land, and as they were erected leases of them were to be granted, a separate lease of each house being granted if the company wished it. On the 30th of April, 1883, a deed was executed by which the company gave to mortgagees an equitable mortgage of their interest under the building agreement, and agreed to give the mortgagees legal mortgages by demise of the houses when the leases had been granted. This mortgage was transferred to *Kent*, who made an equitable mortgage of it to the Plaintiffs. After this the company obtained leases, and deposited two of them by way of equitable security with the Appellants, who now seek to establish their priority over the Plaintiffs.

(1) 33 Ch. D. 1. (2) 2 Drew. 73.
(3) 1 Drew. 193, 200.

As a general rule, equitable incumbrancers take priority according to the order of date, and we have to see whether there is anything to give priority to the Appellants, who are posterior in point of time. They have possession of the leases, but that is not enough, unless they can shew that their having possession of them is owing to some default of the first mortgagees. It is urged that if the first mortgagees had given notice to the corporation, the leases would not have been handed over to the company, and that it therefore is owing to a default of the first mortgagees that the leases are in the hands of the Appellants. Now it is an established rule that, as regards charges on real estate, notice is not necessary in order to complete the security. Where an equitable charge is given on personal estate in the hands of a trustee, notice to the trustee is necessary as against subsequent incumbrancers, but not so in the case of land. It is contended, however, that if the absence of notice enables a subsequent mortgagee to get possession of the deeds, the prior mortgagee ought to be postponed. No doubt he will be postponed if he does an act or omits to perform a duty, and the subsequent mortgagee gets the deeds in consequence of such act or omission. Thus in *Rice* v. *Rice* (1) the vendor did an act by which he enabled the purchaser to represent that the purchase-money had been paid, and he was, therefore, postponed to a person to whom the purchaser made an equitable mortgage by deposit. In the present case, if notice had been given to the corporation, it is probable that they would not have handed the leases to the company. But where notice is not necessary to complete the security, I think that the omission of the incumbrancer to give notice is not such negligence as will postpone him to a subsequent incumbrancer. If an equitable mortgagee, knowing that there are title deeds, does not ask for them, he is knowingly taking an incomplete security; and if he gets them and afterwards hands them to the mortgagor, and allows him to keep them for an unreasonable length of time, he does an act which gives the mortgagor an opportunity of committing a fraud, and he loses his priority as against any one who gets the deeds through his default. Here the first mortgagees got the only documents which were in existence at the time, and I think we should be

(1) 2 Drew. 73.

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introducing an unreasonable novelty if we were to hold that their not giving notice of their security to the lessors was such negligence as to postpone them.

Then as to the authorities. Both sides relied on *Mumford* v. *Stohwasser* (1), and it is to some extent an authority in favour of each. The Master of the Rolls there says: "Although he knew that a lease was soon to be granted, or ought to have been granted, he gives no notice to the college, nor makes any attempt to prevent that speculative builder getting possession of the lease. He, knowing from the nature of the case that the lease would be granted to him, takes no steps to prevent this man committing a fraud, and I might almost say tempts him (in one sense of the word) to commit a fraud by taking no step." Those remarks are in favour of the Appellants, but if the Master of the Rolls had really meant as much as his words seem to express he would have postponed the plaintiff instead of deciding in his favour. The decision supports the contention of the Plaintiffs in the present case; but it is doubtful whether there any notice would have enabled the plaintiff to prevent the delivery of the lease to the builder, and the decision therefore is not so much in favour of the Plaintiffs in the present case as it would otherwise have been. Then *Layard* v. *Maud* (2) was much relied on by the Appellants, and at first sight it looks very like the present case. There *A.*, having contracted to purchase an advowson, borrowed money from *B.* and covenanted with him to complete the purchase and convey the advowson to him by way of mortgage within six months. The advowson was not conveyed to *A.* for nearly two years, and when it was conveyed to him he did not convey to *B.* but made an equitable mortgage to *C.*, with whom he deposited the deeds. It was held that *B.* must be postponed to *C.* The ground of this decision is stated in *Thorpe* v. *Holdsworth* (3), where the Vice-Chancellor says that in *Layard* v. *Maud* there was conduct by the first mortgagee amounting to acquiescence. He did not get the deeds, and does not appear to have made inquiry for them though eighteen months had elapsed from the time when they ought to have been delivered to him. The case might well be looked upon as standing on the same footing

(1) Law Rep. 18 Eq. 556, 564. (2) Law Rep. 4 Eq. 397.
(3) Law Rep. 7 Eq. 139.

as if the first mortgagee had received the deeds and then handed them back to the mortgagor and allowed him to retain them for an unreasonable time, in which case he would undoubtedly be postponed. I am of opinion, therefore, that the appeal fails.

FRY, L.J.:—

This is a contest between two equities, neither of the parties having any legal estate. The security of the Plaintiffs is prior in date. The Appellants contend that the Plaintiffs ought to be postponed on the ground that they, the Appellants, have a better equity. In *Shropshire Union Railways and Canal Company* v. *Reg.* (1) Lord *Cairns* says: "Your Lordships have to deal with a case of a pre-existing and undoubted equitable title, and circumstances which are alleged to have defeated and to have taken away that pre-existing equitable title. My Lords, that pre-existing equitable title may be defeated by a supervening legal title obtained by transfer. And I agree with what has been contended, that it may also be defeated by conduct, by representations, by mis-statements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that, in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced." A distinction is to be drawn between two sets of circumstances, which at first sight look very similar. One class is where a mortgagee knows that the mortgagor has not fulfilled his obligations, and yet does nothing. The other is where the mortgagee does not know that the mortgagor has failed to fulfil his obligations, but knows only that there are obligations which he may in the future fail to fulfil, and yet takes no precautions against the consequences of his doing so. Instances of the first class are cases where the mortgagee, knowing that the mortgagor has the title deeds, neither receives them nor demands them from the mortgagor, or

(1) Law Rep. 7 H. L. 496, 506.

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where the mortgagor has received them from the mortgagee for a particular purpose and does not return them when he ought to do. *Layard* v. *Maud* (1) is a case of this class. There was an agreement which bound the mortgagor to execute a mortgage and hand over the deeds in six months, and the mortgagee allowed eighteen months to elapse after the expiration of that period without making any inquiry. There was, therefore, to the knowledge of the mortgagee a default by the mortgagor in fulfilling his obligations.

The other class of cases is where the mortgagee has taken no precautions against future default by the mortgagor, no default having yet to the knowledge of the mortgagee taken place. I know of no decided case in which the mortgagee has been postponed on the ground that he did not take precautions against a future fraud by the mortgagor; and I do not know of any general rule which obliges you to assume that every person with whom you are dealing is likely to be a knave.

Now to which class does the present case belong? The mortgage to the *Union Bank* gave them a right to receive the leases. But when it was executed the time had not arrived for the leases to be granted. The mortgagees did not know that the right to vary the time for granting the leases had been or would be exercised: they did not know that they had been granted. They did not know that the mortgagors were not trustworthy. The Plaintiffs then did not, until after the security of the Appellants had been taken, know that the mortgagor had made any default in performing his engagements; and in my opinion they cannot be postponed to the Appellants for the mere absence of precaution against a future fraud.

BOWEN, L.J.:—

I am of the same opinion, and have nothing to add.

Solicitors for Appellants: *Newman, Hays, & Co.*

Solicitors for Plaintiffs: *Bolton & Co.*

Solicitors for other Parties: *Badham & Williams; John Hands; E. A. Nelson; Thomas Bowker.*

(1) Law Rep. 4 Eq. 397.

H. C. J.

BOYLE *v.* SACKER.

C. A. 1888 July 4.

[1888 B. 2744.]

Practice—Service on Defendant out of the Jurisdiction—Vacation Judge—Ex parte Order—Rules of Supreme Court, 1883, *Order* XII. *r.* 30; *Order* LXIII. *r.* 12; *Order* LXX. *r.* 2.

Order LXIII., r. 12, which provides that no order made by a Vacation Judge shall be reversed or varied except by a Divisional Court or the Court of Appeal or the Judge who made the order, does not apply to an *ex parte* order, and after the close of the Vacation an application to discharge it must be made to the Judge to whose Court the cause is attached, and not to the Court of Appeal in the first instance.

An order was made for substituted service in *England*, of a writ and notice of motion for injunction, on a person resident abroad. He did not enter an appearance, but appeared by counsel on the motion for the injunction, filed affidavits and argued the case on the merits.

Held, that the proper course for the Defendant to have taken was to have applied at once to the Judge to whose Court the cause was attached to discharge the order for service, and that not having done so, but filed affidavits, appeared by counsel, and argued the case on the merits, he could not now complain of the order for service.

THE Defendant was a Russian subject, resident at *Odessa*, but carried on business in *London*. The Plaintiffs were a *London* firm. The writ was indorsed with a claim for money had and received by the Defendant for the use of the Plaintiffs; for money advanced by the Plaintiffs to the Defendant; for an account of all dealings between the Plaintiffs and Defendant on joint account or in partnership; for the delivery up to the Plaintiffs of certain goods consigned from *Odessa* to *England*; and for an injunction to restrain the Defendant from dealing with or disposing of those goods.

On the 28th of May, 1888, Mr. Justice *Charles*, as Vacation Judge, made an order *ex parte* giving the Plaintiffs liberty to issue the writ, and to serve it with notice of motion for an injunction and receiver for Friday the 8th of June, on Messrs. *Piesse & Son*, the Defendant's solicitors. The writ was issued on the 2nd of June, and on the 4th of June the substituted service was effected.

The motion for a receiver and injunction came on before Mr.

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Justice *Chitty* on the 8th of June, but stood over for a week at the request of the Defendant, for whom counsel appeared, and again on the 15th it stood over for a week. On the 23rd it came on to be disposed of, affidavits having been filed on both sides. Counsel for the Defendant then raised an objection to the order of the 28th of May, by way of preliminary objection to the motion being heard. Mr. Justice *Chitty* said that as there was no motion before him to discharge the order he need not consider whether he had jurisdiction to discharge it. His Lordship thought that probably the right course would be to apply to the Court of Appeal for that purpose. That, moreover, the Defendant had appeared and filed affidavits on the merits, and that an objection of this kind ought not to be taken suddenly, particularly after what had taken place, and could not be entertained. The motion was then heard on the merits and an order for a receiver was made. The Defendant had not entered an appearance.

On the 25th of June the Defendant served notice in the Court of Appeal that the order of the 28th of May might be discharged.

1888. July 4. *Whitehorne*, Q.C., having stated the case.

Romer, Q.C., and *Butcher*, for the Respondents:—

We take three preliminary objections: (1) that the Appellant, though he has not entered an appearance, has appeared by counsel, filed affidavits, and taken his chance of success on the merits, and that after this it is too late for him to object that he was not properly served: Order LXX., rule 2; *In re Orr Ewing* (1); *Tozier* v. *Hawkins* (2); (2) that a direct appeal will not lie; the Defendant ought to have moved in the Court below to discharge the order under Order XII., rule 30; (3) the Appellant is out of time in appealing from this interlocutory order four weeks after it was made.

Whitehorne, Q.C., and *Willis Bund*, for the Appellant, were desired by the Court to confine themselves to objections (1) and (2):—

As to objection (1), this is not a case of irregularity, but of

(1) 22 Ch. D. 456. (2) 15 Q. B. D. 650.

want of jurisdiction, and Order LXX., rule 2, does not apply. As to objection (2) the Defendant could not apply to Mr. Justice *Charles*, who, as the vacation was ended, had no jurisdiction, and he could not apply to Mr. Justice *Chitty*, as he was not the Judge who made the order, and by Order LXIII., rule 12, could not reverse or vary an order of the Vacation Judge.

COTTON, L.J.:—

In this case three preliminary objections have been taken, first, that the Appellant appeared and took his chance of success or failure on the merits, and after that cannot object that he is not properly made a party; secondly, that he has never applied to discharge the order for service; and thirdly, that the appeal is out of time. I shall say nothing about the third objection, but the first and second are of some importance. When the Defendant was served with the order of Mr. Justice *Charles*, if he objected to it, he ought to have moved to discharge it. He could not apply for that purpose to Mr. Justice *Charles*, who had ceased to sit as Vacation Judge, and it was contended that according to Order LXIII., rule 12, he could not apply to Mr. Justice *Chitty*, as he was not the Judge who made the order. But that rule does not apply to an *ex parte* order. To whom, then, should the application have been made? As the vacation was over, it should have been made to Mr. Justice *Chitty*, to whose Court the action was attached. Order LXIII., rule 12, only applies to reversing or varying an order made by a Vacation Judge; discharging an order is not the same thing as reversing or varying an order, it does not go on the ground that there has been an erroneous decision, but on the ground that the opposing party has not had an opportunity of being heard. I am, therefore, of opinion, that an application to this Court, not being an appeal from the Court to which the application ought to have been made, is irregular. Then as to the second objection. The order for service gave leave to serve at the same time notice of motion for the 8th of June, and the writ and notice of motion were served on the 4th in the manner authorized by the order. The Defendant appears by counsel and gets the motion to stand over for a week, then at the end of the week it stands over again at his request. Whether

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his counsel addressed the Court or not is immaterial. On the 23rd of June, both parties having filed affidavits, the motion came on, and counsel appeared for the Defendant and argued the case. During the argument an objection was taken to the order of the 28th of May, which objection Mr. Justice *Chitty* very properly refused to entertain, as there was no motion to discharge the order. The Defendant's counsel did not, even then, say "we are not properly here," they argued the case on the merits, which they had no right to do except upon the footing of the Defendant being a party. After this, I am of opinion that he cannot be heard to say that he was not properly served.

BOWEN, L.J.:—

I am of the same opinion.

FRY, L.J.:—

I also agree. The proper course to be taken by a defendant who objects to the service is pointed out by Order XII., rule 30. He need not now enter a conditional appearance, but he must move to discharge the order authorizing the service.

Solicitors for the Plaintiffs: *Foss & Ledsam.*
Solicitors for the Defendant: *Piesse & Son.*

H. C. J.

In re DIGGLES. GREGORY *v.* EDMONDSON.

C. A. 1888 July 6.

[1886 G. 44.]

Will—Precatory Trust—"It is my desire that she allows."

The doctrine of precatory trusts is not to be extended, and, in considering whether precatory words create a trust, the Court will not look only to particular expressions, but see whether on the whole will the testator's intention was to create a trust, and regard will be had to any embarrassment and difficulty which would arise from a trust.

A testatrix gave all her property real and personal to her daughter "her heirs and assigns; and it is my desire that she allows to *A. G.* an annuity of £25 during her life, and that *A. G.* shall if she desire it have the use of such portions of my household furniture as may not be required by my daughter." The daughter and her husband were appointed executors:—

Held (reversing the decision of the Vice-Chancellor of the County Palatine), that no trust or obligation to pay the annuity was imposed upon the daughter, but that there was only a request to the daughter, not binding her in law, to make that provision for *A. G.*

MARY ANN DIGGLES, widow, made her will, dated the 4th of August, 1868, as follows:—"I give, devise and bequeath all my real and personal property and effects unto my daughter *Frances Edmondson*, her heirs and assigns, and it is my desire that she allows to my relative and companion, *Anne Gregory*, now residing with me, an annuity of £25 during her life, and that the said *Anne Gregory* shall if she desire it have the use of such portions of my household furniture, linen, &c., as may not be required by my daughter *Frances Edmondson*. I desire that my gold watch may be given to my grandson *Alfred Thomas Edmondson*, and my small diamond and emerald ring to my granddaughter *Frances Mary Edmondson*. And I hereby appoint my said daughter *Frances Edmondson* and her husband *Alfred Edmondson* executrix and executor of this my will."

The testatrix died on the 16th of September, 1872, and the will was proved by *Alfred Edmondson*, power being reserved to *Frances Edmondson*.

The £25 a year was paid to *Anne Gregory* down to 1883. The payment was then discontinued, and in March, 1886, *Anne Gregory*

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commenced this action in the Court of Chancery of the County Palatine against Mr. and Mrs. *Edmondson*, claiming (1) payment by the Defendants of the arrears of the annuity and of a sufficient sum to purchase a government annuity of £25 for her life, or the appropriation of a sufficient sum to meet the annuity, and (2) administration, if necessary, of the real and personal estate of the testatrix, on the footing of wilful default.

The Vice-Chancellor of the County Palatine on the 15th of March, 1887, made an order declaring that Mrs. *Edmondson* became entitled to the real and personal property and effects of the testatrix subject to a valid trust to pay thereout to the Plaintiff an annuity of £25 during her life. The order went on to direct administration of the estate on the footing of wilful default as against *Alfred Edmondson* (1).

(1) 1887. March 15. Vice-Chancellor *Bristowe* after stating the will proceeded as follows:—

The question is whether that expression of desire constitutes a sufficient trust in favour of Miss *Anne Gregory* of the annuity of £25 a year. It is contended on behalf of Mr. and Mrs. *Edmondson* that it amounts to nothing more than the expression of a wish not binding on them, and that, having regard to the decisions on the subject, it cannot be held to create a good trust in favour of Miss *Gregory*. It must be admitted that the tendency of recent decisions is to restrict and not to extend the doctrine that a trust is created by words expressing only a recommendation or wish, but here we have an expression which has been held in several instances to constitute a trust, viz., "it is my desire." It was strongly urged by Mr. *Neville* that the words "that she allows" which immediately follow, make a difference between this and any other decision, and ought to have the effect of cutting down the meaning and effect of the word "desire" into a mere expression of a wish on the part of the testatrix that Mrs. *Edmondson* should allow £25 a year. I have not been able to find in the cases any authority on the effect of the word "allow," and I am obliged to Mr. *Rotch* for the interpretation of it which he has given from the dictionaries—"grant, give, afford, yield." The allowance of costs gives an absolute right to payment, you get your allocatur, and you get the costs thereby allowed. It therefore must be carefully considered what is or what is not to fall within these words "I desire that she allows." In the case of *Mason* v. *Limbury*, cited Amb. 4, *A.* by will gave £2000 to *B.*, which he "desired him at his death to give to his son and his children and the children of his daughter as he should think fit." *B.* died before the testator, but it was held that there was a good trust of the £2000, and that the beneficiaries were entitled to it. Another case is *Vernon* v. *Vernon* (Amb. 4) where a testator desired and earnestly requested his son to make up his mother's jointure to £500 a year. That was held an absolute trust. That case shews that the word "desire," which we have here, is sufficient

The Plaintiff appealed, asking for an order in the terms of the claim. The Defendants gave notice that they should contend that the judgment, so far as it declared a trust in favour of the Plaintiff, should be reversed, and that the order directing accounts and inquiries should be discharged and the action dismissed.

Rotch, for the Appellant:—

No precise form of words is requisite to create a trust, and words of request are sufficient if the subject and object are defined. The Vice-Chancellor went chiefly on *Mason* v. *Limbury*, cited Amb. p. 4, where the words were, "I desire him to give." None of the later cases affect that decision. There is no distinction to be drawn between "give" and "allow." The residuary legatee has spent the assets, and then says, "You have been paid as long as there were assets to pay you, and you cannot be paid any longer." I ask for a judgment *de bonis propriis*. The assets being charged with my annuity the executor had no right to hand them over to the residuary legatee without providing for the annuity.

Neville, Q.C., and *Horridge*, for the Defendants, were desired by the Court to confine themselves to the question whether there was a binding trust or charge:—

The tide has completely set against raising a trust from precatory expressions. The Court will now put a reasonable

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to constitute a trust, and I do not find any decision to the contrary. I think it is also clear that the word "desire" creates a good trust if the word following is "give" or "pay." The question is whether the word "allow" is such a strong word as to cut down the meaning of the word "desire." The later cases shew that the doctrine of precatory trusts is not to be extended: *Lambe* v. *Eames* (Law Rep. 6 Ch. 597); *Stead* v. *Mellor* (5 Ch. D. 225); *In re Adams and the Kensington Vestry* (24 Ch. D. 199; 27 Ch. D. 394); but in all those cases the language was much less in favour of the creation of a trust than here. I have come to the conclusion that the word "desire" is sufficient to create a trust unless there is anything to cut down its meaning. After careful consideration I cannot come to any conclusion other than that the testatrix meant to make an imperative direction for the payment of the annuity to *Anne Gregory*, that the word "allow" is not enough to cut down the effect of the word "desire," and that the words "it is my desire that she allows" amount to "I direct her to pay."

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construction on the will, and see whether the testator intended anything more than a recommendation which the legatee was at liberty to disregard: *In re Adams and the Kensington Vestry* (1). There is here nothing but an expression of a wish that the daughter would make an allowance of £25 a year, and she did so as long as she could afford it.

[They were then stopped by the Court.]

Rotch, in reply:—

In the case referred to the amount was uncertain; here the amount as well as the object is ascertained.

COTTON, L.J.:—

This is an appeal from a judgment of the Vice-Chancellor of the County Palatine, who has directed accounts and inquiries as to the estate of Mrs. *Diggles* at the suit of *Anne Gregory*, who claims to be entitled to an annuity of £25 under her will. The question is, whether upon the true construction of the will *Anne Gregory* was a legatee. I think that the testatrix clearly did not intend the £25 a year to be provided for by the executors in the discharge of their duties as such. The Vice-Chancellor has directed accounts of the estate, and the Appellant, who asks for more than the Vice-Chancellor gave her, contends that it was the duty of the executors to set aside a sufficient part of the assets to provide for the annuity, before handing over the residue to the residuary legatee. This contention, in my opinion, is unfounded. The direction, if binding direction there be, is one to be performed by the residuary legatee and not by the executors. But does it impose any trust or duty on her as the Vice-Chancellor has held that it does? I think not. I think that what the testatrix meant was, to leave all her property to her daughter, with the expression of a wish that she would allow *Anne Gregory* £25 a year, and give her any part of the furniture which she did not want. She means to put her daughter in her own place, saying, "I ask you to make what I think would be a proper provision for *Anne Gregory*," but without intending to bind her to do so. Construing the will without reference to the

(1) 27 Ch. D. 394.

authorities I think that is its true construction. It is said, however, that the authorities support the Appellant's contention. No doubt in the old cases slight expressions were laid hold of to create a trust, but the recent authorities have gone the other way. I adhere to what I said in *In re Adams and the Kensington Vestry* (1): "Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will." A reasonable construction is to be given to the will; and in my opinion upon the reasonable construction of this will the testatrix cannot be held to have intended to give a binding direction. In my judgment, therefore, the action must be dismissed.

BOWEN, L.J.:—

In my opinion this will creates neither a trust nor a charge as to the annuity of £25. It is urged that it has not been uncommon to translate words of desire or request into words imposing an obligation, and it is said that this will be done where the property and the object are certain. But just as uncertainty of the property and object are reasons for not construing the will as creating a trust, so also the fact that a trust would cause embarrassment and difficulty is a reason for coming to the same conclusion. No duty as to this annuity is imposed on the executor. Was it, then, the duty of the residuary legatee to set apart a sum to meet this annuity? I think the true view of this will is that no obligation at all was imposed on the residuary legatee, but only a request made to her, making it merely her moral duty to pay reasonable attention to the wishes of the testatrix. The direction is remarkably expressed: "My desire is that she allows," which seems to import that the daughter is to exercise some choice. What found its way to *Anne Gregory* was to be dependent on the action of the daughter. My view is strengthened by the clause as to the furniture, which can only be construed as referring to the use during her life of such parts of the furniture as the daughter thinks fit. I think that there is nothing more in the

(1) 27 Ch. D. 394, 410.

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will than the expression of a hope that this kindness will be shewn to *Anne Gregory*, and that no obligation is imposed.

FRY, L.J.:—

I am of the same opinion, and if we were not differing from the Judge below I should add nothing. The testatrix gives all her real and personal property and effects to her daughter. Under this gift the daughter would take the whole *in specie*. The testatrix then says: "And it is my desire that she allows to *Anne Gregory* an annuity of £25 during her life." According to the ordinary meaning of the English language this only expresses a desire and does not import a trust or charge. Moreover, the expression "that she allows" implies a certain amount of discretion in the daughter. Now consider the inconvenience of what we are asked to decide, that there is a precatory trust affecting the whole property—that the whole property is held in trust to pay £25 a year to *Anne Gregory* for her life. No fund is directed to be set apart, so if there be a trust, it is a trust affecting the whole property. If so, the residuary legatee could not sell a bedstead or give away a ring without committing a breach of trust. This is a monstrous result, and we ought not so to decide unless we are forced to it by the authorities, and I do not think that any case goes such a length. In *Mason* v. *Limbury* (1) there was no difficulty in giving effect to the gift of the £2000, the difficulties which occur in the present case did not exist there. The later cases have established the reasonable rule that the Court is to consider in each particular case what was the testator's intention. Construing this will according to the ordinary use of the English language, I think that the testatrix did not mean to tie up her whole property during the life of *Anne Gregory*, but to give it absolutely to her daughter, trusting to her affection and honour to make such allowance to *Anne Gregory* as she mentioned in her will.

Solicitors for Plaintiff: *Pritchard & Co.*, agents for *Payne & Frodsham, Liverpool.*

Solicitors for Defendants: *Jaques & Co.*, agents for *C. C. Deane, Liverpool.*

(1) Cited Amb. p. 4.

H. C. J.

In re LAND DEVELOPMENT ASSOCIATION.

C. A. 1888 July 14, 16, 17.

KENT'S CASE.

Company—Shares—Payment in Cash—Agreement to apply Debt owed but not payable by Company to Shareholder in payment of future Calls—Pending Petition to wind up—Fraudulent Preference—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628].

By the articles of association of a company the directors were empowered to receive from any member willing to advance the same all or any part of the moneys due upon his shares beyond the sums actually called for. *K.*, a shareholder in, and formerly the managing director of, the company, on the 2nd of April, 1886, took an assignment from a creditor of the company of a debt of the company's payable by instalments, none of which were at that time due, and requested the directors to apply a sufficient part of the debt in paying in full the shares standing in his name, on which shares no call was at that time payable. The directors on the same day passed resolutions that the seal of the company should be affixed to the assignment, and that the debt assigned should be applied in paying up in full *K.*'s shares. Nothing further was done to carry the transaction into effect; there was no entry in reference to it in the books of the company other than the minute of these resolutions, nor was any contract registered as to the shares within sect. 25 of the *Companies Act*, 1867.

At the time of this transaction a petition for the winding-up of the company presented by *K.* on the 13th of March, was still pending. This petition was withdrawn on the 17th of April, but upon another creditor's petition presented meanwhile on the 5th of April, an order to wind up the company was made on the 20th of April:—

Held (affirming the decision of *Kay*, J.), that as neither the debt purchased nor the calls unpaid were debts payable *in præsenti* the transaction of the 2nd of April, 1886, was not equivalent to, and would not support a plea of payment in cash on the shares within the principles of *Spargo's Case* (1) and *White's Case* (2); and therefore that *K.* was liable for calls made in the winding-up in respect of the shares.

Ferrao's Case (3) distinguished.

Held, also, that the transaction of the 2nd of April, 1886, was invalid as a fraudulent preference of *K.* over the other creditors of the company within sect. 164 of the *Companies Act*, 1867.

Per Cotton, L.J.:—The 164th section of the *Companies Act*, 1862, cannot be construed as having now imported into it the 38th section of the *Bankruptcy Act*, 1883, as to mutual credit and set-off.

THIS was an appeal from a decision of Mr. Justice *Kay* (4).

Mr. *Horace Kent* was the holder of 811 £10 shares in, and had been the managing director of, this association.

(1) Law Rep. 8 Ch. 407.
(2) 12 Ch. D. 511.
(3) Law Rep. 9 Ch. 355.
(4) 37 Ch. D. 508.

C. A. 1888 KENT'S CASE.

By the articles of association the directors were empowered to "receive from any member willing to advance the same, all or any part of the moneys due upon the share or shares held by him beyond the sums actually called for."

Early in 1886 the association was indebted to one *Eichholz* in the sum of about £16,000, payable by instalments, the first of which fell due on the 30th of June, 1886, and *Kent* had agreed to purchase the debt from *Eichholz*. On the 13th of March, 1886, *Kent* presented a creditor's petition to wind up the company, but such petition was not advertised. On the 2nd of April *Kent* took an assignment of *Eichholz's* debt, and at a meeting of the directors of the company on that day it was resolved "that the seal of the association be affixed to the assignment from Mr. *W. Eichholz* to Mr. *Horace Kent* of the association's indebtedness to Mr. *W. Eichholz* as expressed therein." *Kent* the same day wrote to the directors requesting them to transfer from the amount due in respect of the debt a sum sufficient to pay up his shares in full. The directors the same day passed a resolution "that the debt assigned by Mr. *Eichholz* to Mr. *Kent* as aforesaid should be applied in paying up in full the shares mentioned in Mr. *Kent's* letter of this date." Nothing further was done to carry the transaction into effect, and there was no entry in reference to it in the books of the company other than the minute of the resolution, nor was any contract registered as to the shares within sect. 25 of the *Companies Act*, 1867. At this time £1 per share remained uncalled on *Kent's* shares. His petition was withdrawn on the 17th of April, but on another petition which had been presented on the 5th of April, an order to wind up the association was made on the 20th of April, 1886. *Kent's* name was placed upon the list of contributories; and upon a summons taken out by the liquidator to enforce a call of £1 per share made in the winding-up in respect of his shares, it was held by Mr. Justice *Kay* that the transaction between *Kent* and the directors not having been carried into effect by any entry in the books of the company, shewing that the shares had been fully paid up, or by any other step beyond the resolution, rested in agreement only, and did not amount to a payment within sect. 25 of the *Companies Act*, 1867; and that the agreement (even if it

would otherwise satisfy the terms of the statute), not having been registered *Kent* was liable to the calls (1).

Kent appealed.

The Appellant *Kent*, in person, addressed the same arguments to the Court that he made use of in the Court below, and contended that the £811 must be treated as paid within the principle of *Spargo's Case* (2) and *Ferrao's Case* (3). He also contended that a company might properly enter into an agreement with one of its shareholders that the amount unpaid up upon his shares should be treated as a debt due from the shareholder to the company, even although such amount had not actually been called up; and might also agree that a debt due from the company to such shareholder should be applied *pro tanto* in crediting the shareholder in satisfaction and discharge of the debt so due from him; and he maintained that this was exactly what had been done in his case, and that it was equivalent to payment in cash within the meaning of the 25th section of the *Companies Act* of 1867. He referred to the judgment of *Mellish*, L.J., in *Fothergill's Case* (4), and to *Ex parte Bentley* (5); *White's Case* (6); and *In re Barrow-in-Furness and Northern Counties Land and Investment Company* (7).

Marten, Q.C., and *Vernon R. Smith*, for the official liquidator:—

On the 2nd of April, 1886, there was no debt due and payable by *Eichholz* to the company; neither was there anything due and payable by *Kent* to the company in respect of his shares. There was not a *bonâ fide* debt payable in money at once, on the one hand, and a *bonâ fide* liability to pay money at once on the shares on the other, and consequently the case does not come within the principles of *Spargo's Case*, and *Ferrao's Case; Calisher's Case* (8); *Black's Case* (9); *In re Whitehouse & Co.* (10). Again, on the 2nd of April a petition to wind up this company, presented by

(1) 37 Ch. D. 508.
(2) Law Rep. 8 Ch. 407.
(3) Ibid. 9 Ch. 355.
(4) Ibid. 8 Ch. 270, 282.
(5) 12 Ch. D. 850.
(6) 12 Ch. D. 511, 517.
(7) 14 Ch. D. 400.
(8) Law Rep. 5 Eq. 214.
(9) Ibid. 8 Ch. 254.
(10) 9 Ch. D. 595.

C. A. 1888 KENT'S CASE.

Kent, was actually pending, and although that petition was withdrawn on the 17th of April, an order to wind up the company was made on the 20th of April upon another petition which had meanwhile been presented by a creditor on the 5th of April. So that at the time the transaction relied on by the Appellant took place the company were commercially insolvent and unable to pay their debts as they became due. Under those circumstances a transaction by which *Kent*, a shareholder and ex-managing-director, cognizant of all the affairs of the company, relieved himself of a large liability, and obtained payment of 20*s.* in the pound upon his debt was a fraudulent preference of *Kent* over the other creditors of the company and cannot stand: *Companies Act*, 1862, sect. 164: *Bankruptcy Act*, 1883, sect. 48; *Habershon's Case* (1); *Gaslight Improvement Company* v. *Terrell* (2); *Sykes' Case* (3).

Kent, in reply.—

This was not a fraudulent preference, but a set-off of one debt against another: *Bankruptcy Act*, 1883, sect. 38. The position of the company was improved by the transaction, and the petition which was withdrawn on the 17th of April, had never been verified, so it was not in reality a pending petition on the 2nd of April.

COTTON, L.J.:—

This is an appeal from a decision of *Kay*, J., holding the Appellant liable to £811 in respect of calls of £1 per share in the winding-up of this company.

The Appellant contends that this sum must, though not actually paid in cash to the company before it was wound up, be treated as paid within the principles of *Spargo's Case* (4), and other cases, because there has, as he says, been that which was equivalent to payment, viz., payment by the company of a debt owing by it to the shareholder, and payment by the shareholder of a call for which he was liable to the company. The whole question turns, of course, upon the 25th section of the

(1) Law Rep. 5 Eq. 286.
(2) Ibid. 10 Eq. 168.
(3) Law Rep. 13 Eq. 255.
(4) Ibid. 8 Ch. 407.

Companies Act, 1867, and in *Spargo's Case*, *James*, L.J., with his usual terseness and clearness, expresses himself thus (1):— "It was considered that there was mischief in collateral contracts of that kind" (that is to say payment for shares by providing goods on an agreement to provide goods), "which deprived creditors of the remedies which they would expect to have against persons whose names they saw registered on the list of shareholders. In *Fothergill's Case* (2) the bargain in effect was to give paid-up shares in satisfaction of the money which was to be paid for other shares. But if a transaction resulted in this, that there was on the one side a *bonâ fide* debt payable in money at once for the purchase of property, and on the other side a *bonâ fide* liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's Case*, and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that if the two demands are set off against each other the shares have been paid for in cash. If it came to this, that there was a debt in money payable immediately by the company to the shareholders, and an equal debt payable immediately by the shareholders to the company, and that each was accepted in full payment of the other, the company could have pleaded payment in an action brought against them, and the shareholder could have pleaded payment in cash in a corresponding action brought by the company against him for calls. Supposing the transaction to be an honest transaction, it would in a Court of Law be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient for this Court sitting in a winding-up matter."

Mellish, L.J., though he does not express himself in exactly the same terms, uses language which must be considered as assenting to the view taken by *James*, L.J., for he says (3): "Nothing is clearer than that if parties account with each other,

(1) Law Rep. 8 Ch. 412. (2) Law Rep. 8 Ch. 270.
(3) Law Rep. 8 Ch. 414.

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and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by *A.* to *B.*, and then handing it back again by *B.* to *A.*, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards."

In *White's Case* (1) I myself expressed the same view at considerable length, saying in the course of my judgment (2): "That was merely allowing substance to prevail over form, that is to say, that it should not be necessary in such a case for the company to pay their debt to the shareholder, and for the shareholder to pay his debt to the company, either by giving money one to the other, or by the company handing over a cheque to the shareholder and his handing it back again."

Let us now apply these principles to the present case, having regard to the 25th section of the Act of 1867. Here there were 811 shares standing in the name of *Kent*, and there was a provision in article 11 that the directors might receive from any member willing to advance the same, all or any part of the moneys due upon his shares beyond the sums actually called for. At the time in question, *i.e.*, the 2nd of April, 1886, no call had been actually made, but I assume for the purposes of my judgment, that there was at that date a debt due to *Eichholz* from the company exceeding the amount uncalled upon *Kent's* 811 shares. But there had been in the previous year an agreement between him and the company under which his debt was payable by instalments at certain specified times, and no portion of it was due and payable on the 2nd of April, 1886, nor until the 30th of June, 1886. So that *Kent* had become the purchaser of a debt owing, but not then immediately payable, and there was then no call due upon his shares. [The Lord Justice then stated the letter written by *Kent* on the 2nd of April, 1886, and the resolution passed by the directors on the same day, and continued:—]

Can that transaction be said in any way to support the plea

(1) 12 Ch. D. 511. (2) 12 Ch. D. 520.

of payment in cash? No. The debt due by the company to *Eichholz* was not payable, at all events, till the 30th of June; the liability on the shares was not a debt payable *in præsenti*, nor until the directors thought fit to make a call, or until a winding-up order should be made. It is impossible, therefore, thatt his can be in substance a payment by the company to *Eichholz*, and a payment back again by *Kent*, as his transferee, to the company within the principles laid down by *James*, L.J., and *Mellish*, L.J., in *Spargo's Case* (1). It was not a payment at all, but a mere contract as to something to be done *in futuro*. As to what was said by *Kay*, J., as to the absence of any entry in the books of the company, I think that if there had been an entry of a sum paid by the company to *Eichholz*, and then of a sum received by the company from *Kent*, that might have shewn that the company had treated the transaction as a payment to *Eichholz* and a receipt through *Kent*, of the money paid to *Eichholz*. But that would not have been evidence of the agreement here entered into, which was a mere contract as to something to be done *in futuro*. It might have been evidence of a different agreement and a different transaction. But there was no such entry made before the winding-up. And after the commencement of the winding-up no entry amounting to an admission of payment and receipt could be made, because it would have the effect of altering the relation and position of the parties. Upon this point *Ferrao's Case* (2) does not in any way support the contention of Mr. *Kent*. It is true that in that case there were no calls actually due; but the Court held that the moment the company, in pursuance of the Judge's order, made the entry in their books crediting *Ferrao's* shares with the £700, that moment the £700 was paid, just as much as if it was paid in cash. And that case is entirely different from the present.

Then it was contended that we ought to construe the resolution of the directors on the 2nd of April as an agreement that *Eichholz'* debt and *Kent's* call should both be treated as presently payable. My opinion is that such an agreement would not have been within article 11, which contemplates, not an arrangement for a set-off of a debt by the company, but an actual

(1) Law Rep. 8 Ch. 407. (2) Law Rep. 9 Ch. 355.

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receipt of the money in anticipation of its being called up. However, in my opinion, the resolution does not amount to an agreement to that effect.

But, independently of these considerations, I think that upon the true aspect of the transactions an agreement to anticipate payment of the debt owing to *Eichholz* and to receive by anticipation the sum still payable on the shares, would have operated to give *Kent*, as *Eichholz'* assignee, a fraudulent preference over the other creditors of this company. For I come to the conclusion that at this time the company was not able to pay its debts when they became due with its own money. There was a petition pending which was filed by Mr. *Kent*, because he thought there were other creditors who might want to wind up the company, and three days after the transaction in question in this case another winding-up petition was presented on which an order was made before the end of April, so we should be shutting our eyes if we were to hold that this transaction was not in contemplation of the winding-up. We have, therefore, to consider the effect of the *Bankruptcy Act*, 1883, as to fraudulent preference. [The Lord Justice then read sect. 48 of that Act, and sect. 164 of the *Companies Act*, 1862, and continued:—] This transaction giving *Kent*, as *Eichholz'* assignee, a preference over other creditors who could not then be paid in full is a fraudulent preference, and it is utterly immaterial that the debt owing to *Eichholz* was for a larger amount. Then it is said that as the 38th section of the *Bankruptcy Act*, 1883, allows in the case of an individual mutual credit and set-off of debts and only requires proof for the balance, there is here no fraudulent preference. But under the *Winding-up Acts* a shareholder who is also a creditor is precluded from any set-off as regards his debt after the commencement of the winding-up. And this transaction being in anticipation, and in view of the winding-up, is not protected in any way by that law of bankruptcy. In my opinion, therefore, this 38th section will not prevent any transaction from being a fraudulent preference which would otherwise be so; and the enactment in the 164th section of the *Companies Act* of 1862, that that shall be a fraudulent preference in the case of a company which would be a fraudulent

preference in the case of an individual trader cannot be construed as having now imported into it this 38th section of the *Bankruptcy Act*. Particularly in the face of the express provision in the Act of 1862 that shareholder creditors cannot claim in a winding-up in competition with outside creditors. In my opinion this case is somewhat like *Sykes' Case* (1), where the directors, having a power similar to that in this case to receive by anticipation amounts not actually called up on shares, adopted the ingenious contrivance of paying into a bank the amounts remaining uncalled on their own shares, and applying the money in payment of their own fees, claiming both to keep the fees and escape the liability on their shares. That was held not to be a *bonâ fide* transaction, and the directors were not relieved from the liability on their shares.

I am of opinion, therefore, that this appeal fails.

FRY, L.J.:—

In this case the Appellant contends that he has paid the whole amount upon his shares, and he relies upon the instrument of the 2nd of April, 1886, and the resolution agreed to by the directors of the company of that date. On that 2nd of April, 1886, the facts, shortly stated, stood thus: Mr. *Eichholz* had certain large claims against the company, and Mr. *Kent* had been managing director of the company. A certain sum of £3000 was payable by *Eichholz* on the 30th of June then next, an unascertained balance was payable in the December following, and there were two large sums which were secured by debentures of the company payable on the 1st of January, 1893. Now the company at a meeting of the directors of the 2nd of April fixed their seal to a document by which Mr. *Eichholz* purported to assign to Mr. *Kent* the four sums which I have mentioned, and by which the company purported to ascertain and agree with Mr. *Eichholz* the balance payable in December at the sum of £3000 and no more. All the sums, therefore, of which Mr. *Kent* became the assignee under that instrument were sums alleged and treated by the company as *debita in præsenti, solvenda in futuro*. Mr. *Kent* was the owner of a considerable number of shares in this com-

(1) Law Rep. 13 Eq. 255.

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pany, upon which all the amounts then due and payable had been paid; and, although in my judgment a debt existed from Mr. *Kent* to the company in respect of the balance unpaid on those shares, that also was a sum not payable *in præsenti*, but *in futuro*. That being the condition of things, the company passed this resolution:—[The Lord Justice then read the resolution of the 2nd of April and continued:—]

The first inquiry, then, is: does that transaction amount to a "payment" of the amount unpaid upon *Kent's* shares within the meaning of the word as used in the 25th section of the *Companies Act*, 1867? If we were at liberty to have recourse to the very words of the section, no question could arise. There is no pretext or suggestion for speaking of it as a payment in cash; but, the effect of the decisions of this Court in *Fothergill's Case* (1), *Spargo's Case* (2), and *White's Case* (3), has been to strike out of the statute for the purpose of every Court bound by those decisions those words "in cash"; and as this Court is so bound, we are not at liberty to have recourse to these words. The inquiry, therefore, which we have to answer is, whether the transaction amounted to that which would have been pleadable as payment in a plea at law; and I answer without hesitation that it did not, and for this reason. The resolution is not a present settlement of the accounts between the parties. Mr. *Kent* and the company did not come face to face with one another and actually settle their accounts. All the resolution does is this. It contemplates that the debt assigned by *Eichholz*, which was payable at various future dates, shall be applied to paying up in full the shares standing in *Kent's* name. That appears to me to be, according to the true construction character and nature of the transaction, merely a stipulation for a future set-off against the debt due by *Kent* on his shares of the debts payable by the company to *Eichholz* as and when they become payable.

Now, if on the 30th of June, when the first £3000 became payable, the company had made an entry by which they had, on a settlement between themselves and *Kent*, treated that as a payment by *Kent* upon his shares, the matter might have stood in a

(1) Law Rep. 8 Ch. 270. (2) Law Rep. 8 Ch. 407.
(3) 12 Ch. D. 511.

different position. But nothing of the sort was done. The transaction, therefore, in my judgment does not amount to a payment within the 25th section of the statute of 1867.

But supposing it were a payment, it was, in my judgment, void as a fraudulent preference, because the company were at that time, according to the conclusion which I arrive at from the facts, unable to pay their debts as they became due from their own moneys. The company was, to use the words of Mr. *Kent* himself, when he presented the first petition for a winding-up, "commercially insolvent" at a period not very long before this, and, although it is true that in the interval between that time and the 2nd of April the arrangement had been come to with *Eichholz*, I cannot agree with Mr. *Kent* that it substantially altered the position of the company, and I think that the description "commercially insolvent" which he employed with regard to the company at an earlier date was true on the 2nd of April. If there were two persons who were familiar with the whole position of this company, they were, I suppose, *Eichholz* and *Kent*; and *Eichholz* is willing to sell this debt of £16,000 for a sum of £400 paid down, *Kent* covenanting (guaranteed as to a part of it by certain other gentlemen) that he would pay £3500. They, between them, estimate the solvency of the company on the valuation of the debts of the company at about 5*s.* in the pound. The matter does not rest there. At the date I am speaking of, the 2nd of April, two petitions for the winding-up of the company had already been presented, and very shortly afterwards the company was wound up upon another petition presented on the 5th of April. It is admitted that since the winding-up of the company not a shilling has been paid to the creditors; and it is obvious that on the 2nd of April the company were unable to pay their debts out of their moneys as they became due; and that the object of the transaction was to give to Mr. *Kent*, by setting-off against 20*s.* in the pound which he would have had to pay upon his shares, the debt which had been valued between himself and Mr. *Eichholz* at 5*s.* in the pound, a preference over the other creditors of the company. I shall not elaborate the point, because it is too plain for discussion.

But even apart from the 154th section of the *Companies Act*, or

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the section of the *Bankruptcy Act* which defines fraudulent preference, it seems to me impossible to give to this transaction the effect which Mr. *Kent* alleges. It was sanctioned at a meeting of the directors held on the 2nd of April, 1886, when the position of the company and its difficulties must have been known to them. There were only three of them present, Mr. *Shurley*, Mr. *Erroll*, and Mr. *Butt*, and Mr. *Shurley*, who presided as chairman, had agreed to assist Mr. *Kent* in this transaction, on the understanding that a part of the debt should be applied in paying up the shares then standing in his (*Shurley's*) name in the books of the said company. At that meeting, not only is the sanction of the board given to a transfer of between 3000 and 4000 shares from Mr. *Kent*, but the unascertained balance of the debt due from the company to Mr. *Eichholz* is then and there settled, without any further investigation, so far as appears, although we are told that the account was an intricate and difficult one, at a sum of £3000, and the seal of the company is put to the acknowledgment of that matter. Under those circumstances I think the whole transaction was, in the language which was used by Lord Justice *James*, either a sham, or a fraud, or a deceit; and, independently of legislation, I, for one, should decline to give to that transaction the effect of payment as between the company and the Appellant.

For these reasons I am clearly of opinion that the appeal must fail, with the usual result.

LOPES, L.J.:—

Mr. *Kent* contends his shares are fully paid up. This depends upon the meaning of the 25th section of the *Companies Amendment Act*, 1867. I think the meaning and object of that section is that a person is to be prohibited from contracting that shares issued shall be paid for otherwise than in cash, except by a registered contract. Now there is no registered contract here, and the question is whether or not there has been a payment in cash. Now the authorities have clearly determined what amounts to a payment in cash. They have determined that by a payment in cash, according to the words used in this section, is meant any such transaction as would in an action at law for

calls on the shares support a plea of payment. Therefore the material question on this point is whether the transaction that took place on the 2nd of April, 1886, would support a plea of payment. What was that transaction—what was the nature of it? It appears to me it was an agreement between Mr. *Kent* and the directors that a certain debt due to him from the company, but not payable *in præsenti*, should be applied to his liability, not then existing, but which might arise at some future time.

Now, is this a payment, or, in other words, would it support a plea of payment in cash for calls? It is to be observed no entry was made in the books, and there is no writing off of the amount. I am clearly of opinion it would not. It has been said that this case is like *Ferrao's Case* (1), and Mr. *Kent* relies on *Ferrao's Case*. I cannot see that *Ferrao's Case* assists him. On the contrary, I think it is against him; because if that case is looked at it would appear that the principle of it was this. It was not held in that case that the contract or the Judge's order was a sufficient payment, but it was held that the actual writing off of the amount in the books of the company was equivalent to payment. Now, that any such transfer of figures would amount to a plea of payment, or would be evidence of a plea of payment, is clear, and it was so held in *Eyles* v. *Ellis* (2). Then, it is said, assume this to be a payment, it would be bad as a fraudulent preference. I am clearly of opinion the transaction of the 2nd of April did amount to a fraudulent preference. It appears to me it was a transaction carried out in contemplation of the winding-up, with the view of giving a particular creditor a preference over other creditors. I think, therefore, that that transaction amounted to a fraudulent preference. For these two reasons I think this appeal should be dismissed. I forbear from making any further observations with regard to the other matters which have been alluded to by my learned Brothers.

Solicitors: *H. C. Morris*; *Badham & Williams.*

(1) Law Rep. 9 Ch. 355. (2) 4 Bing. 112.

W. W. K.

C. A.
1888
KEKEWICH, J.
Feb. 22, 23.
C. A.
July 17, 20, 21, 23.

CROFT *v.* RICKMANSWORTH HIGHWAY BOARD.

[1885 C. 3190.]

Highway Act (5 & 6 *Will.* 4, *c.* 50), *s.* 67 [*Revised Ed. Statutes, vol. vii. p.* 828] —*Drain—Dumb-well.*

A dumb-well, viz., a well into which waste water flows through a pipe and thence percolates into the soil, is not a "drain or watercourse" within the meaning of the *Highway Act*, 5 & 6 Will. 4, c. 50, s. 67, and cannot be made or used by the highway board in lands adjoining the highway.

MR. *H. H. S. CROFT*, the Plaintiff in this case, was the owner of a house and grounds near *Rickmansworth* and of a piece of land adjoining thereto and abutting on the high road from *Rickmansworth* to *Watford*. On this piece of land was an old chalk pit fenced off from the road, but said to have been formerly without fence. Many years ago the turnpike trustees of the high road constructed a barrel-drain, from the open mouth of which the surface-water from the high road, and of late years the sewage from certain houses, flowed into the chalk pit. In or before the year 1869, when Mr. *Croft* came into possession, a dumb or dead well had been constructed in the chalk pit, and was connected by pipes with the barrel-drain, so that thenceforward the water from the barrel-drain ran into the dumb-well and so sank into the earth. It could not be positively ascertained by whom this well and these pipes were constructed and placed there. The turnpike trust came to an end in 1881, and in 1882 the *Watford* District Highway Board, in whom the control of the highway was then vested, cleaned out the dumb-well and put new pipes, but, as the Plaintiff alleged, without his knowledge. Some correspondence then followed as to the rights of the highway board.

The *Watford* District Highway Board was afterwards dissolved, and in 1884 the *Rickmansworth* Highway Board was formed under the *Highway Act*, 1835, and succeeded to the rights of the *Watford* Board so far as related to this highway.

Mr. *Croft* had then stopped up the pipes, and they remained so for more than two years. In 1885 the *Rickmansworth* Board cleaned out the pipes. Mr. *Croft* again stopped up the pipes and filled up the dumb-well. The board cleared them out, and Mr. *Croft* brought this action to restrain them from so doing.

The action was tried before Mr. Justice *Kekewich*, in May, 1887, when questions as to an alleged agreement, and as to a prescriptive right, and as to the right of the board to bring sewage on the land were raised, and in the end judgment was given for the Defendants. The Plaintiff appealed, and the Court of Appeal made the following order:—"This Court doth order that the said judgment dated 17 May, 1887, be set aside and a new trial had between the parties; this Court being of opinion that the substantial question between the parties was, whether the Defendants were or were not authorized to open the pipes and dumb-well in the Plaintiff's chalk pit in 1885 as in the pleadings mentioned as part of their highway system of drainage."

The action came on for the new trial before Mr. Justice *Kekewich* on the 22nd of February, 1888.

Barber, Q.C., and *Morshead*, for the Plaintiff.

Warmington, Q.C., and *Sebastian*, for the Defendants.

The case turned almost entirely upon the question, whether a dumb-well with a pipe leading to it is a "drain or watercourse" within the meaning of the *Highway Act*, 5 & 6 Will. 4, c. 50, s. 67 (1). The arguments and the evidence are sufficiently stated in the judgment of the Court.

(1) 5 & 6 Will. 4, c. 50, s. 67. "And be it further enacted that the said surveyor, district surveyor, or assistant surveyor shall have power to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, plats, or bridges as he shall deem necessary in and through any lands or grounds adjoining or lying near to any highway, upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby, to be settled and paid in such manner as the damages for getting materials in inclosed lands or grounds are herein directed to be settled and paid."

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KEKEWICH, J. (after stating how the case came before him, and that he had nothing on this occasion to do with the sewage, and that if the Plaintiff wished to try the question whether sewage could be passed down this drain he must do so by proper means, proceeded):—

I have only to decide this one question, whether the existence of the drain between the road and the dumb-well and of the dumb-well itself is justified by the power vested in the Defendants, the *Rickmansworth* Highway Board? It is conceded that they themselves did not make it; but their case is consistent with usage, and in order to use it they have cleansed it out, and they claim the right to cleanse it out.

I do not propose to trace the history of the Defendant board, who are the successors, at any rate, in a popular sense, of more than one other board or trust. Nor do I propose critically to examine the different sections of the Acts of Parliament which gave their predecessors power with reference to drains and the like. I think if they were critically examined the sections of the previous Acts of Parliament would be found to be in nowise larger or narrower in substance than the 67th section of the Act 5 & 6 Will. 4, c. 50; and Mr. *Barber*, in reply, was content to put aside those other questions and rely on the construction of sect. 67 for the purpose of his case. He felt that if the construction of that section were against him it was of little avail to see what was enacted by previous statutes.

What has happened is this: Until some time in 1869, about the time when Mr. *Croft*, the Plaintiff, first became connected with this property, but before he became the owner in fee, there was a drain coming down to the highest point of this chalk dell and there discharging drainage by means of an open mouth, so that drainage, road grit, water, and other things came down into the chalk dell finding its way through the soil further down the hill, or, as we have evidence now to prove, occasionally in times of heavy rain flowing through the chalk dell on to the road again, which lower down is on a level with the chalk dell. Sometime about 1869—there is no evidence to shew exactly when—somebody connected this drain, by means of a pipe, with the interior of the chalk dell, carrying it on some yards, and in

the centre of the chalk dell constructed a dumb-well. A dumb-well has been defined and explained, and I suppose is a tolerably familiar thing to all of us. What the meaning of "dumb-well" etymologically is I do not know, but what it means in practice is this: it is not a well from which water can be taken, and connected with a source of water below, but is a well in which water rests, and out of which it finds its way by natural percolation. This well was constructed, as I have said, sometime about 1869. After that the pipe, being insufficient, was altered avowedly by the highway authority of the day, and changed from an irregular 6-inch pipe to a regular 9-inch pipe. It has been cleaned by the present Defendants, and Mr. *Croft* has interfered with it by filling up the dumb-well and choking the pipe, and the Defendants have again cleaned it out. Those are the only facts as regards construction which I think it is necessary to refer to.

I have, therefore, to consider upon the evidence before me, whether the well and pipe were made rightly or wrongly. It was suggested in the course of the case that they had been laid by some one occupying land adjoining, for the purpose of allowing sewage to pass down through the pipes and get discharged into this chalk pit. There is not the slightest evidence of that, and I think the inference is not justified by anything before me. If one can find a legal origin for an existing state of things, rather than an illegal origin, one is bound to do so; and here it has been common ground that it was not constructed by the owner of the chalk dell, and, as I say, there being no evidence of its having been constructed by any neighbour for an improper purpose, what occurs to me, irrespective of the evidence, would be that it was made by the highway authority of the day for the purpose of carrying the surface water from the road to the dumb-well and so disposing of it by percolation. That is the almost natural conclusion to arrive at, particularly when one finds that the pipes and dumb-well have that effect. Except when the dumb-well gets filled up and wants cleaning, or except perhaps, under some extraordinary circumstances, such as a heavy thunderstorm, the pipes and the dumb-well are sufficient to carry away the water, and to get rid of it and keep the road clear. Therefore that

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points to the dumb-well and pipes having been made for that particular purpose. If, beyond that, I find that the highway authority have power to do a thing of this kind, then I am forced to the conclusion that that which does what they require was made by them for the purpose, and I have, therefore, to examine whether the highway board have that power or not. If they have not, the inference may be rebutted, and, certainly, would not be so strong.

I turn to sect. 67. The highway board is now "the said surveyor, district surveyor, or assistant surveyor"—that is to say, an Act of Parliament (which can make any word in the English language mean anything else, and give any legal effect to any phrase which Parliament pleases) has said that the *Rickmansworth* Highway Board is to be deemed to be the surveyor, therefore surveyor may mean in the section "the said board." It shall "have power to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, plats, or bridges as he shall deem necessary in and through any lands or grounds adjoining or lying near to any highway." Mr. *Barber* has argued that this dumb-well—he has not been quite so bold as to address that argument to the pipes connecting the road-drain with the dumb-well—is not a drain or a watercourse. I am by no means sure that it is not a watercourse, because it has been proved that it is a watercourse in this sense—that the water goes by percolation through it into the soil below. I am quite sure that it is a drain. Mr. *Barber* says that I must not hold it to be a drain unless it is a conduit to convey water from one point to another point, which implies a continuous flow. If it were true to this extent that it must mean a conduit for conveyance of water from one definite point to another definite point, then the definition would prevent "drain" meaning "dumb-well," because percolation of course takes it by natural channels, and no one can tell by what particular course; but it is a conduit for conveying water by percolation to a point from the dumb-well itself to another point; that is to say the bottom of the hill. I think even his own definition is answered. Then he says it must imply a continuous flow, and a continuous flow in that way there is. But even without

resorting to that, I should not hesitate to hold that the dumb-well is a drain. I should certainly hesitate to hold that a drain must have two artificial terminations. I can understand a drain being a blind drain having no end, perhaps terminating in a fissure, or in some other natural channel, not artificial, by which the water found a way to the bottom of the hill; but, take it whichever way you will, I think the dumb-well, and particularly the dumb-well and connected pipes, may be fairly described as a drain or watercourse.

Then the point was made that this is not the proper way of draining a road, and that the highway board has not this power to make, scour, cleanse, and keep open any drain or watercourse, unless it is a drain or watercourse of a character which is properly used for draining the road—in other words, that the surveyor, or highway board, cannot properly do that which is not necessary under the surrounding circumstances. That is a very fair criticism. Without evidence one may not be able to arrive at the conclusion that a dumb-well is a convenient way of draining a road, but I have a large body of evidence, really uncontradicted, by many experienced surveyors living in and carrying on their business in this very county and this very neighbourhood, which I suppose I may assume to be one of steep hills, who say that there are a large number of dumb-wells all over their districts, and that it is a reasonable and convenient way of draining a road, and they have pointed out the great advantage of draining in that way rather than in any other. Therefore I find that this is a dumb-well which is a drain, and which is a reasonable drain under the particular circumstances, and of a kind used in the district, and that it has been used for a considerable time. It seems to me that it has been used throughout properly under the powers of the highway authority for the time.

There is only one other point which is suggested, and that is this, that unless there is a real necessity for interfering with private property, the Court ought not to allow a highway board to exercise its authority and to interfere with private property. The answer to that is, the surveyor cannot now prove that it could not be done in any other way, because there it is, and it is not as if the Plaintiff were coming now for an injunction to

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prevent their laying down the pipes and making the dumb-well, but the surveyors say, "We found it there," and this proved that it is on the whole at least as good as any other means of drainage, and one gentleman, who gave his evidence in a very straightforward manner, says he could have carried the water straight down the hill into the river, but that he did not do so because he was told to do it at the least possible cost, and he found it would cost £15 more to carry it off into the river, and, having regard to the feelings and pockets of the ratepayers, he turned it into Mr. *Croft's* chalk dell instead, or, rather, made those arrangements which allowed it to go there instead of carrying it down into the river.

There is this further question: Mr. *Croft* says he has not been compensated, and that he ought to be compensated. No doubt Mr. *Croft* has not been compensated. That is conceded, but it is by no means conceded that somebody has not been compensated. I am not dealing with that question, and I do not wish to interfere with Mr. *Croft's* rights, if he has any, to have his damages assessed according to the manner provided by the Act. We must not, however, lay this out of sight—that having regard to the time which has elapsed since the construction of the dumb-well, there is, at any rate, some room for the presumption that whatever compensation was due was paid long ago. That will, of course, not prevent him from claiming compensation for any interference from time to time from cleansing, scouring, and so forth. Any claim of that sort he must make in the proper way, and before the proper tribunal, and I will say nothing to prejudice him in that further effort to insist upon his rights.

No doubt, in many cases, the dumb-wells of which we have heard were constructed upon waste ground, and probably one reason for that was because there was waste ground. Another reason may have been that the surveyor for the highway board naturally made his dumb-well on waste ground, where there would practically be no claim for compensation, rather than on private ground, where he might have been met by a claim for compensation. I cannot see that that makes the slightest difference, particularly when we know that some of those dumb-wells have been constructed on private property, and the Act of

Parliament particularly says that they may be made "in and through any lands or grounds adjoining or lying near to any highway, upon paying the owner or occupier of such lands or grounds" compensation, shewing that the Legislature intended that private property should give way in this case, as in many others, to public purposes.

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That seems to me to dispose of the whole case. The Plaintiff is wrong and must pay the costs, with the exception of certain costs mentioned in the former order.

C. M.

The Plaintiff appealed from this judgment. The appeal came on to be heard on the 17th of July, 1888. C. A.

In the course of the argument before the Court of Appeal the Plaintiff obtained leave to examine further witnesses as to the persons by whom the dumb-well was originally made, but no new facts were elicited.

The Plaintiff in person, in support of the appeal:—

There is no proof that the turnpike trustees made the pit originally; on the contrary, the evidence tends to shew that it was made by trespassers who desired to drain sewage into it. It never formed part of the system of drainage of the turnpike trustees. It was really a cesspool, and there is sufficient evidence to shew that it was not so constructed as to let the water freely percolate through the bottom and sides.

But whatever were the circumstances under which it was first made, the onus is on the Defendants to shew that they have a right to use it under their Act. They did not succeed to the powers of the turnpike trustees: those powers depend entirely upon the *Highway Act* (5 & 6 Will. 4, c. 50), s. 67. There is nothing in that section to justify the making or using such a pit as this. It is not "a drain or watercourse" in any sense of the words. The Defendants have produced evidence that such dumb-wells are used by the highway boards in other parts of the county; but that does not justify the act of the Defendants. Nor do they shew that the highway could not be drained in any other way; it is really only a question of expense. On the other

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hand, such a pit must almost necessarily become a nuisance: for when once made it will be impossible to prevent sewage from flowing into it.

[He referred to *Reg.* v. *Godmanchester Local Board* (1); *Crosthwaite* v. *Dean* (2); *Norton* v. *London and North-Western Railway Company* (3); *Boyfield* v. *Porter* (4); *Vernon* v. *Vestry of St. James, Westminster* (5); *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Worksop Board of Health* (6); *Tinkler* v. *Wandsworth Board of Works* (7); *Sutton* v. *Mayor of Norwich* (8).]

Warmington, Q.C., and *Sebastian*, for the Defendants:—

The history of the construction of the pit is not known, but there is sufficient evidence to shew that it was used by the turnpike trustees for the drainage of the highway, and that it was used as a dumb-well, allowing the water to percolate into the soil. The books and accounts of the turnpike trustees are not in the hands of the Defendants: they are said to have been destroyed. The Court ought to presume a legal origin to the pit; it may have been made under a grant from the owner of the land, or it may have been made under the *Turnpike Act*, 1822 (3 Geo. 4, c. 126, ss. 83, 84, 113, 115). There is evidence to shew that it is not uncommon in *Hertfordshire* to drain highways into dumb-wells, and it is difficult to believe that this is illegal. But however drainage into this pit was initiated, we can justify our use of it under the section of the *Highway Act* which has been referred to, 5 & 6 Will. 4, c. 50, s. 67. The words "drains or watercourses" will cover it. It was not constructed to hold the water, but to allow it to percolate through into the earth, and is within the proper meaning of a "drain."

[They referred to the definition of a "drain" in *Johnson's*, *Latham's*, *Webster's*, and the *Imperial Dictionaries*; and to *Earl of Derby* v. *Bury Improvement Commissioners* (9)].

The Plaintiff, in reply.

(1) Law Rep. 1 Q. B. 328.
(2) Ibid. 5 Eq. 245.
(3) 9 Ch. D. 623; 13 Ch. D. 268.
(4) 13 East, 200.
(5) 16 Ch. D. 449.
(6) 26 L. J. (Ch.) 345.
(7) 27 L. J. (Ch.) 342.
(8) Ibid. 739.
(9) Law Rep. 4 Ex. 222.

COTTON, L.J.:—

This has been a most unfortunate litigation about, apparently, a very small matter. I must express my regret that it was not in some way settled between the Plaintiff and the Defendants, so as to obviate the inconvenience of which the Plaintiff complains. What we have to do, after a second hearing and appeal in this case, is to give our judgment on the matters which are brought before us.

The Plaintiff is the owner of a house and land which is on the slope of a hill, there being on his property, above his house, what has been called a chalk dell, in which there is a pit, sometimes called "a cesspool," and sometimes called "a dumb-well." There was, before this litigation commenced, connected with that pit, a drain coming from the road, which sent down into the pit not only surface water from the road, but, as the Plaintiff alleges, and as I assume is the fact, a certain amount of sewage matter. Originally the Defendants claimed a prescriptive right to drain this sewage down, either by themselves or on behalf of the owners of some houses who are not before the Court now, but Mr. Justice *Kekewich* at the original hearing said that was wrong, and, as I understand, made the Defendants pay the costs of that claim.

When the matter came before us on appeal we pointed out that the parties had not been litigating the real and substantial question between them, because what the Defendants had done was this: they, being the highway authority of *Rickmansworth*, had taken on themselves to enter on this chalk dell (which I must take now to be proved or admitted to be part of the property of the Plaintiff) to clean out the dumb-well that was there, and to allow certain drains which came from the road to empty their contents into it. Of course, they could not justify that, which would be a trespass, unless they could shew that they had some statutory authority for doing it. Therefore, when the matter came before us, we pointed out that the real question to be decided was this: were the Defendants authorized to clean out this pit and the drain pipes connected with it as part of their drainage system? That was intended to raise the question whether under the Act under which they acted they had authority to do what they did for the purpose of draining their road, they having no right to

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turn down any sewage there, or do anything for the purpose of sending sewage there.

Now the Defendants were constituted as the highway board in 1884. Previous to that time, so far as we know the history of this case, this road had been under the control of the trustees of a turnpike trust that had come to an end, I think, in the year 1881. Then between that time and the year 1883 the *Watford* District Board were the highway authority. They came to an end in 1883, and then in 1884 the present *Rickmansworth* Highway Board were appointed under the Act of 5 & 6 Will. 4, c. 50. This Act of 1835 (5 & 6 Will. 4) does not in any way vest in the Defendants, as the *Rickmansworth* Highway Board, constituted under that Act, any powers which existed or might have existed in any previous board or any previous trustees; it gives them certain powers, and even although it might be established that the trustees of the turnpike road had made this with the consent, or by the license, or under the grant of a former owner of this property, that right would not vest in the present Defendants; it is not transferred to them, and they could not rely upon any such license or grant. However, in my opinion (if it is necessary to give an opinion), that is not made out, and there are many circumstances which contradict the theory of there being any such license or grant from any former owner of the property.

The 18th section of the Act enabled the Board "to carry into effect the powers, authorities, and directions in this Act contained." That is, therefore, their whole authority. The simple point to my mind is, does this Act of Parliament give them the power of dealing with this matter? Now the only section to which we have been referred is this 67th section. I think the case turns on what is the true construction of that section. It is, indeed, said that this local board, when they came into power in 1884 in fact found this pit there, and to a certain extent draining the road under their control, and therefore that they had the duty thrown upon them of keeping the roads in order, and the right to use this which they said was an appendage to the road; they said that in one sense it was part of the road, and therefore if they had the control of the

road they had the control of this. It was used undoubtedly for draining the road; but unless this Act gives them power to do it, it cannot, in my opinion, be considered any part of the road, so that they have the control of that as part of the road. It was simply a thing used, rightly or wrongly, when they came into possession, for the purpose of draining the road. I agree that it was done in accordance with what seems to be a common practice in this county, to put pits at intervals on a hill, and to bring into them the surface water from the roads to prevent it from scouring the road and doing injury to it, because the water runs into them and soaks away gradually.

Now what is there to justify that in sect. 67? It says: "That the said surveyor"—and the board are referred to as the surveyor—"shall have power to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, plats, or bridges as he shall deem necessary, in and through any lands or grounds adjoining or lying near to any highway." Then they are to pay compensation, provided that the land is not waste or common, for any injury that may be done. Now I assume here—though I do not decide as a matter of fact, that that is so—that this must be considered a dumb-well, that is to say, that it is not bricked at the bottom, so that the water cannot pass away—although there was a doubt or contest about that—but is a pit going down to the chalk or porous bottom, so that the water might drain away through that porous bottom or through that chalk so as to be got rid of.

In my opinion, that does not come within the words of clause 67. They must make, cleanse, and keep open ditches, drains, gutters, or watercourses. It is not said that this is a ditch; it is not said that it is a gutter; but it is said that it is a drain or watercourse, and we have been referred to some definitions of "drain" this morning. I do not think the verb "to drain" has anything to do with it. No doubt this pit was used for the draining of the road; but that does not make it a "drain." All that is done is this—by a drain the water is brought into this pit, there to be left or deposited or collected, and it goes down into the ground and drains away; but that, in my opinion,

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does not make it a drain. Very often drains are carried by the permission of an owner into a pond; but it cannot be said that that pond is part of a drain; it is that which receives the water after it has passed from, and come out of, the drain. So the object is here not to carry the water away, but to let the drains have something into which they can empty their water and allow it to percolate away through the land. In my opinion a drain, especially looking to the connection here—"ditches, gutters, drains, or watercourses"—does not refer to a pit like this (whether it is called a dumb-well or anything else) which is a mere hole in the ground, and is not intended to carry away the water which the highway authorities wish to get rid of but to allow it to remain there until by percolation it can get into the soil and be carried away. It may be attended with very inconvenient consequences to the owner of the property, because although if there was a little rain it would percolate away, when there is an excess, or if, as there is said to be, there is any offensive matter mingled with the drainage from the road, it may produce considerable nuisance.

The only question we have to consider in my opinion is this, have these Defendants power under their Act of Parliament to make or continue this pit? In my opinion they have not, and therefore the Plaintiff is entitled to an injunction restraining them from opening out this dumb-well or pit in the chalk or from again introducing the pipes into it.

FRY, L.J.:—

I also feel myself unable to concur in the conclusion at which the learned Judge has arrived in this case.

About the year 1885 the Defendants, who are the highway board for the *Rickmansworth* district, opened certain pipes leading into the dumb-well of which we have heard so much, and which must be taken to be on the land of the Plaintiff. Thereupon the Plaintiff brought this action asking for an injunction to restrain the Defendants from opening or excavating the dumb-well; and the matter was tried before Mr. Justice *Kekewich*. When it came before this Court on appeal from his original decision the Court sent it back with a declaration of opinion

"that the substantial question between the parties was whether the Defendants were or were not authorized to open the pipes and dumb-well in the Plaintiff's chalk pit as in the pleadings mentioned as part of their highway system of drainage." That was the only question which required decision at the second hearing, and is the only question which requires decision now at our hands.

Who, then, are the Defendants, and what are their authorities? They are a board which came into existence in the month of April, 1884, under the provisions of the 18th section of the *Highways Act* of 1835, which section, as has been already pointed out, authorized the constitution of the board and defined its duties, and those duties were to carry into effect the powers, authorities, and directions contained in the Act of 1835, the *General Highway Act*. We have, therefore, a simple inquiry, was it one of their powers, or authorities, or directions conferred by that Act to open this so-called dumb-well? which does not seem to me a very difficult inquiry. Now the only section in that Act which has been, and therefore I presume which can be relied upon, to shew that there is any such power or authority is the 67th section, and that gives the surveyor (using the language of the Act that is now translated to mean the board) power to open ditches, gutters, drains, or watercourses upon the lands of owners adjoining the highway.

Then comes the inquiry, was this so-called dumb well a ditch, a gutter, a drain, or a watercourse? Now what was the structure? It appears to have been this—a pit about eight feet deep, and, as I gather, three or four feet in diameter excavated in the bottom of this chalk pit. Into that the water from the road was led by barrel-drains. It sank into the pit. It appears to have passed through the bricks which surrounded it into the porous chalk, which also surrounded the pit. In giving that description I am taking the Defendants' statement, which I think is a fair and accurate description of the pit. This dumb-well then was a cavity through which the water was permitted to pass from the drain into the porous chalk. Now is that dumb-well a drain or watercourse? In the first place, I think according to the ordinary use of the English language, a dumb-well is neither a drain nor a water-

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course. I do not think anybody using the English language in the ordinary way would describe it as a drain or a watercourse. In point of fact we are told that these structures or these excavations bear a number of names; they are called sometimes "dumb-wells;" they are called sometimes "swalletts;" they are called sometimes "swallow-holes;" and they are called sometimes "absorbing-holes;" but no one suggests that they are called "drains." I observe in the course of this long discussion nobody, except perhaps in argument, has ever called this dumb-well a drain. I do not think that according to the ordinary meaning of the English language it is a drain or watercourse. Not only do I think that the ordinary English language will not include in it any such thing as a drain or watercourse, but I think it is substantially different from one or the other. I think "a drain or watercourse" is applied to that sort of conveyance by which you direct the course of the water, and where you can follow the course of the water, and where you can correct any mischief which arises from an impediment to a flow of the water where you can do the repairs. You know what you are dealing with in the case of a watercourse or a drain; but the effect of this dumb-well is to throw the whole of the water passing into it into the subjacent strata to work its own way through the porous chalk. Now we are told that in many cases these dumb-wells are constructed in beds of gravel lying on chalk. In other cases they are constructed in the porous chalk. Who is to follow the effect of continually throwing water, it may be in very large quantities, down one of these dumb-wells? It may operate, and it would operate of course to some extent, on the bed of gravel or sand through which it passes, and for aught I know it may in course of time either lead up to or increase subterranean channels of water, which may bring about a subsidence of the superincumbent soil; or, again, it may appear at the foot of the hill in the character of that sour water or moisture which we all know arises at the bottom of hills where there is a considerable supply of moisture. All these things prevent your being able to apply to dumb-wells of this description the same characteristics and the same legislation which might be safely applied to a drain or watercourse. I think, therefore, that not

merely in point of terms, but in point of substance, the thing is different from a drain or a watercourse. That being so, I think it is not within the powers given by the statute of 1835.

Then it is said that this dumb-well was found as part of the existing system of the drainage of the road when the Defendant board came into existence in 1884, and therefore every intendment ought to be made to support the exercise of the powers of the present board in reference to all the existing modes of drainage. In the first place, that argument seems to me to be of very little avail when you are dealing with a statutory body like the Defendants, whose powers are confined to statutory powers given to them, and who are not in any sense the successors in title of the preceding board or authorities. But, further than that, in point of fact I think the argument is wrong, because at the time when the Defendant board was created this dumb-well was filled up, and had not been opened for some thirteen years, and was in point of fact no efficient part of the drainage system at the time when the Defendant board was constituted.

Then we are referred to the earlier statutes. But the earlier statutes under which the turnpike trustees were constituted did not give powers quite so large in point of terms as the statute which I have already dealt with. The statute giving authority to the trustees of turnpike roads is the 4 Geo. 4, c. 95. Sect. 67 gives similar powers to the one I have referred to; but the words used were only "drains or watercourses."

Then we are asked to infer some grant or leave and license by which this structure was in existence. As regards that, I think the circumstances repel the idea. In the first place, there seems to have been a belief that this piece of land was waste; and the probability to my mind is that the thing was done without anybody's leave or license. Again, I exceedingly doubt whether the trustees of a turnpike road were capable of receiving a grant or acting upon a leave and license which should extend their statutory obligations. They were bound to apply the moneys they received for the purpose of making the road according to the statute, and they have no right, I think, by receiving any grant or any leave or license to extend the area of the works on which they were to expend their money. But, in point of fact, there

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is no ground, looking at all the circumstances of the case, on which the presumption urged upon us can arise. I think, therefore, the question comes back to the one which I stated in the first place, was there any authority under the Act of 1835 to open this dumb-well as a drain or watercourse? In my opinion it was not a drain or watercourse, and consequently there is no such power. I think, therefore, the injunction ought to be granted.

LOPES, L.J.:—

The word most relied upon in sect. 67 is the word "drain," and that is properly most relied upon; but I do not think that this pit is a drain within the meaning of that section. Assuming it to be a dumb-well, I do not think a dumb-well is a drain. I understand by a "drain" something conducting liquid away and into which liquid may continuously pass. By a "dumb-well" I understand something which is a receptacle to receive liquid which is brought to it by a drain. It appears to me that if the Defendants might make and cleanse a dumb-well, as they contend, on the land of an adjoining owner it would be difficult to see why they might not conduct their water on to the land of an adjoining owner without any dumb-well at all, leaving it to pass off as best it may. In my opinion this appeal should be allowed.

Solicitors for Plaintiff: *Gadsden & Treherne.*

Solicitors for Defendants: *Rhodes & Son*, for *Rowell & Lomas, Rickmansworth.*

M. W.

In re HARVEY.
PEEK *v.* SAVORY.

[1887 H. 2777.]

C. A.
1888
NORTH, J.
Jan. 16, 24.
C. A.
July 25.

Will—Construction—Remoteness—Divisible Gift.

The will of a testatrix contained an ultimate limitation of her real estate to her right heirs in case both her daughters (for whom and their husbands and issue provision had been made by the will), should die without leaving any child or the issue of any child living at the decease of the survivor of them, or of the survivor of their respective then present or any future husbands. The personal estate was bequeathed by reference on the trusts of the real estate. Neither of the daughters married again. Each died leaving her husband surviving her, but no issue:—

Held, by *North*, J., that the gift over was divisible into two distinct gifts, viz. (1) in case both the daughters should die without leaving issue living at their respective deaths; (2) in case the daughters or either of them should die leaving issue, and there should be no such issue living at the death of the survivor of the husbands of the daughters; and that, the first event having happened, the gift over was good, though it would have been void for remoteness if the daughters had left issue.

Held, on appeal, that the gift over was not in the alternative on the happening of either of two distinct events, but a single gift over on one event involving two things; that as the testatrix had not separated the gift the Court could not separate it, and that therefore the gift over was void for remoteness.

ORIGINATING SUMMONS by the executors of the surviving trustee of the will of *Margaret Harvey*, widow, who died on the 30th of November, 1846, to determine some questions relating to the construction of her will, the principal question being, whether the will was to any, and, if so, to what, extent void as transgressing the rule against perpetuities.

The testatrix, by her will, executed in October, 1838, after making some specific devises of real estate, devised to trustees in fee, all and every other her messuages, lands, and tenements, upon trust, by and out of the rents, &c., of the estate thereby devised, to keep the buildings in repair and to pay the taxes, &c., and one moiety of the surplus of such rents, &c., testatrix directed to be paid to her daughter *Mary Ann Hodgkins* during her life, for her separate use, without power of anticipation. And the testatrix

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further directed that the other moiety of the surplus rents, &c., should be paid to her daughter *Ann Elizabeth Hull*, during her life, for her separate use, without power of anticipation. And, in case her daughter *Mary Ann Hodgkins* should die leaving a husband her surviving, then such husband should receive one moiety of the surplus rents for his own use. And, in case her daughter *Ann Elizabeth Hull* should leave a husband her surviving, then such husband should receive during his life the other moiety of the surplus rents for his own use. And, upon the decease of the survivor of her daughter *Mary Ann Hodgkins*, and of her then present or any future husband, then the testatrix's trustees and their heirs, should stand and be possessed of one moiety of the trust estates, upon trust for all and every the children (if more than one) of her said daughter living at the time of the decease of the survivor of her said daughter and her then present or any future husband, and for the heirs and assigns of such children for ever, as tenants in common. And if her said daughter should leave only one such child, then in trust for such one child, and his or her heirs for ever. Provided nevertheless, that in case any child or children of the said *Mary Ann Hodgkins* should die in her lifetime, or in the lifetime of her then present or any future husband, leaving issue which should be living at the decease of the survivor of them, then such child or children should be entitled to the same share and interest in one moiety of the said trust estates as the father or mother, if living, would have been entitled to. But, in case there should be no child, nor the issue of any child, of the said *Mary Ann Hodgkins*, living at the death of the survivor of her and her then present or any future husband, then the testatrix gave the one moiety of the trust estates to the same person or persons, and for the same estates and interests, as the other moiety of the said trust estates should then happen to belong. And, upon the decease of the survivor of her daughter *Ann Elizabeth Hull*, and of her then present or any future husband, then the testatrix's said trustees and their heirs should stand possessed of one moiety of the trust estates, upon trust for all and every the children (if more than one) of her said daughter *Ann Elizabeth Hull*, living at the time of the decease of the survivor of her and her then present or any

future husband, and for the heirs and assigns of such children for ever, as tenants in common. And if her daughter *Ann Elizabeth Hull*, should leave only one such child, then in trust for such one child, and his or her heirs for ever. Provided nevertheless, that, in case any child or children of *Ann Elizabeth Hull* should die in her lifetime or in the lifetime of her then present or any future husband, leaving issue which should be living at the decease of the survivor of them, then such child or children should be entitled to the same share and interest in one moiety of the trust estates as the father or mother, if living, would have been entitled to. But, in case there should be no child, nor the issue of any child, of *Ann Elizabeth Hull* living at the death of the survivor of her and her then present or any future husband, then the testatrix gave the one moiety of the trust estates to the same person or persons and for the same estates and interests as the other moiety of the said estates should then happen to belong. And, in case both her daughters should die without leaving any child, or the issue of any child, living at the decease of the survivor of them or at the time of the decease of the survivor of their respective then present or any future husbands, then, after the death of such of her daughters as might happen to survive the other of them, and the death of the survivor of their respective husbands, the testatrix gave all the trust estates to the use of such person or persons as the survivor of the daughters should by deed or will appoint, subject, nevertheless, to the life estate of the husbands or husband then living therein, and in default of such appointment she gave all the trust estates to her own right heirs for ever. And the testatrix directed that her executors should, after payment of all her just debts and funeral and testamentary expenses, place out at interest the residue of her personal estate, and pay and apply the income thereof to such person or persons and in such manner as the surplus rents of her real estates devised in trust as aforesaid were made payable, and, upon the decease of the survivor of her daughters and of their then present or future husbands, she gave the trust moneys so directed to be placed out at interest unto the same person and persons as would be then entitled to her real estates thereby devised in trust as aforesaid.

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The testatrix died, as already stated, on the 30th of November, 1846, leaving her two daughters her heiresses-at-law as coparceners. Neither of her two daughters married a second time. Mrs. *Hull* died in May, 1848. She left no issue her surviving. She had had one child who died an infant before the testatrix. Mr. *Hull* died in July, 1868. Mrs. *Hodgkins* died in September, 1873. Her husband died in November, 1886. She had two sons, who died respectively in 1857 and 1865, both of them unmarried. Mrs. *Hodgkins* did not exercise the power of appointment given to her. On the failure of issue of the testatrix a grand-nephew named *Henry Savory* became her heir-at-law.

The Defendants were, the devisees of *Henry Savory*; the personal representatives of Mrs. *Hull;* and the personal representatives of Mrs. *Hodgkins.*

The summons was heard before Mr. Justice *North* on the 16th of January, 1888.

Fraser Macleod, for the Plaintiffs:—

The question is, whether the ultimate limitation over of the real estate to the right heirs of the testatrix is void for remoteness. It was possible that either of the two daughters might marry as a second husband a man who was not born till after the death of the testatrix, and a gift over in the event of there being no issue of a daughter living at the time of the death of the survivor of herself and such a husband would be too remote.

Medd, for the devisees of *Henry Savory*:—

The same person will take the real estate whether the gift over to the right heirs be void or not. It is unnecessary, therefore, to argue the question so far as regards the real estate.

R. F. Norton, for the personal representatives of Mrs. *Hodgkins*:—

The ultimate limitation of the personalty is similar to that of the realty; therefore the validity of the gift over of the realty must be decided for the purpose of deciding who is to take the personalty.

The effect of the ultimate trust of the personalty is to give it

to the persons who constituted the heir-at-law of the testatrix at the time of her death as *personæ designatæ*, *i.e.*, to the daughters as joint tenants.

The ultimate gift over of the realty is not too remote. All the possible members of the class to take must necessarily be ascertained at the time of the daughter's death, though the actual persons who would take might not be then ascertained: *Avern* v. *Lloyd* (1). *Stuart* v. *Cockerell* (2), and *Blight* v. *Hartnoll* (3), may be distinguished. As a matter of fact, at the death of Mrs. *Hodgkins*, the survivor of the two daughters, she had no issue living.

Dibdin, for the personal representatives of Mrs. *Hull*:—

The gift over to the right heirs of the testatrix is too remote. *Avern* v. *Lloyd*, whenever it has been referred to by Judges, has been distinguished. The decision is clearly inconsistent with the course of authority on the point. It might, perhaps, be said that the gift over is divisible into two distinct gifts, one of them being, in the event of the death of the survivor of the two daughters without leaving any issue, and that that gift (which applies to the events which have actually happened) is good: *Evers* v. *Challis* (4); *Watson* v. *Young* (5).

But those cases only shew that there would be an implied gift over in the event of the daughters never having had any issue at all; they do not shew that there is any separate gift over in the event of there being no issue living at the death of the survivor of the two daughters.

1888. Jan. 24. NORTH, J. (after stating the provisions of the will and the other facts, continued):—

It was quite possible that either of the daughters might marry as a second husband a man who was not living at the date of the death of the testatrix, and therefore the trust for the children of a daughter "living at the time of the death of the survivor of the daughter and her then present or any future husband" was void for remoteness. But there was, upon the death of the daughter

(1) Law Rep. 5 Eq. 383.
(2) Ibid. 7 Eq. 363.
(3) 19 Ch. D. 294, 298.
(4) 7 H. L. C. 531.
(5) 28 Ch. D. 436.

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who died first, a good gift over of her moiety to the other daughter for life, with remainder to her husband for life. The question is, whether the ultimate gift over to the right heirs of the testatrix is good, and in my opinion it is good. The gift over is, in case both the daughters should die without leaving any child, or the issue of any child, living at the death of the survivor of them, or of the survivor of their respective then present or any future husbands. If it is a gift over in case both the daughters should die without leaving issue living at the death of the survivor of two persons both of whom must be living at the death of the testatrix, it would be a good gift over. If, on the other hand, it is a gift over in case both the daughters should die without leaving issue living at the death of the survivor of two persons, one of whom might not be living at the death of the testatrix, it would be too remote and therefore bad. In my opinion the clause is elliptical, and is, according to the natural meaning of the words, clearly divisible into two totally distinct gifts over on the happening of two distinct events, —viz. a gift over in case both the daughters should die without leaving any issue living at the death of the survivor of them, and then another gift over in case, if there should be issue of the daughters or either of them living at the death of the survivor of the two daughters, there should be no issue living at the death of the survivor of their then present or any future husbands. The second of these two gifts over would be void for remoteness, but the first, which corresponds to the events which have actually happened, is well within the legal limit and is perfectly good. I should have come to this conclusion upon the construction of the words of the will independently of any authority, but I think that *Evers* v. *Challis* (1), and *Watson* v. *Young* (2), are clear authorities for holding that the gift over is divisible into two. It is unnecessary, therefore, for me to consider *Avern* v. *Lloyd* (3), and the subsequent cases in which that case has been commented on. I hold that, in the events which have happened, there was a good gift over of the real estate to the right heirs of the testatrix. So far as regards the real estate the decision of this question is

(1) 7 H. L. C. 531. (2) 28 Ch. D. 436.
(3) Law Rep. 5 Eq. 383.

immaterial, as the same persons will take the real estate whether the gift over be good or bad. But it was necessary to construe the gift of the real estate, because there is a gift over of the residue of the personal estate of the testatrix on the happening of the same events. There is therefore a good gift over of the personal estate in the events which happened to the daughters (who at the death of the testatrix constituted her heir-at-law as coparceners) as joint tenants, and the personal representatives of Mrs. *Hodgkins*, who was the survivor, are now entitled to it.

W. L. C.

The devisees of *Henry Savory* appealed. The appeal was heard on the 25th of July, 1888.

Cozens-Hardy, Q.C., and *Medd*, for the Appellants:—

It was not noticed by the parties in the Court below that as regards the real estate it makes an important difference whether the two daughters took as devisees or as on an intestacy. If they took as devisees then the whole estate would come to Mrs. *Hodgkins* by survivorship, and on her death intestate would descend to her heir-at-law *ex parte paternâ*. If they took as on intestacy then upon the death of Mrs. *Hodgkins* the estate would descend to the then heir-at-law of the testatrix, whom we represent. Some one therefore ought to be appointed under Order XVI., r. 32, to represent the heir-at-law of Mrs. *Hodgkins*, who died last, and it is submitted that the personal representative of Mrs. *Hodgkins*, who is in the same interest, should be appointed.

[*R. F. Norton*, for the personal representative, assented, and the Court made the appointment.]

We say the gift over is void for remoteness. The mind of the testatrix was fixed on a period of division which was too remote, the original gift being to issue living at the death of the survivor of each sister, and her husband present or future. The same period is referred to in the gift over. The gift over can only be split in a way which would justify splitting any limitation over which depends on several events. If the testator does not make alternative gifts over on the happening of the different

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events the Court cannot do it for him. In *Miles* v. *Harford* (1), *Jessel*, M.R., says: "As I understand the rule of law it is a question of expression. If you have an expression giving over an estate on one event, and that event will include another event which itself would be within the limit of perpetuities, or, as I say, the rule against perpetuities, you cannot split the expression so as to say if the event occurs which is within the limit the estate shall go over, although if that event does not occur the gift over is void for remoteness. In other words, you are bound to take the expression as you find it, and if, giving the proper interpretation to that expression, the event may transgress the limit, then the gift over is void." Then he gives an instance that a gift over, if *A.* has no son who attains twenty-five years, is bad for remoteness, and though *A.* dies without having had a son at all, which event is included in his not having a son who attains twenty-five, still the gift over will fail, because the testator has not made an express gift over on that event. Here there is a gift to a class to be ascertained at too remote a period, and a gift over on failure of that class. The limitation over is a mere writing out at large of "subject to and on failure of the preceding limitations." The expression cannot reasonably be construed as a set of alternative gifts over. In *Evers* v. *Challis* (2) there was a clear limitation over on a second event. In *Watson* v. *Young* (3) there was a distinct alternative gift, and so in the other cases referred to by Mr. Justice *North*. A gift over even to an ascertained person on a too remote event is void: *London and South Western Railway Company* v. *Gomm* (4).

R. F. Norton, for the real and personal representatives of Mrs. *Hodgkins*:—

[COTTON, L.J.:—Is not the gift over in effect a gift on the happening of such one of two specified events as shall last happen?]

No. If that had been intended, four words ought to have been left out, and the gift over would have run, "living at the decease of the survivor of them or of their respective present or any

(1) 12 Ch. D. 691, 702.
(2) 7 H. L. C. 531.
(3) 28 Ch. D. 436.
(4) 20 Ch. D. 562, 582, 588.

future husbands;" or it would have been expressed thus, "living at the decease of the survivor of them and their present or future husbands." As it stands, it imports a gift over in either of two events—failure of issue at the death of the daughters, and failure of issue at the death of their husbands. What the Appellants have to make out is a gift over on the death of the survivor of four tenants for life to persons then to be ascertained. A life estate to an unborn person, with remainder to persons who must be ascertained within the limits of perpetuity, is good: *Evans* v. *Walker* (1); *Hampton* v. *Holman* (2); *In re Roberts* (3); *Avern* v. *Lloyd* (4); *Stuart* v. *Cockerell* (5).

[FRY, L.J.:—Can those cases stand with *London and South Western Railway Company* v. *Gomm* (6)?]

It is submitted that they can. The late Master of the Rolls was a party to both that case and *In re Roberts*. The two cases are distinct. In one case *A.* is made owner subject to a clause shifting over the property from him to *B.* on the happening of a future event; if that event is too remote, the shifting clause is void. In the other case *B.* is made owner at once, subject to prior limitations which are not void for remoteness, and it does not signify that they may not determine till a period too remote for an executory devise to be limited upon its arriving.

Dibdin, for the personal representatives of Mrs. *Hull*.

Cozens-Hardy, in reply.

COTTON, L.J.:—

This will is not expressed in clear language, but I cannot agree with the interpretation which has been put upon it by Mr. Justice *North*. The question is whether the testatrix has made alternative gifts over on the happening of two events, or a gift over on one event involving two things. In order to make the gift good you must come to the former conclusion. Here, if the limitation had been "in case both my daughters shall die without leaving

(1) 3 Ch. D. 211.
(2) 5 Ch. D. 183.
(3) 19 Ch. D. 520.
(4) Law Rep. 5 Eq. 383.
(5) Ibid. 7 Eq. 363.
(6) 20 Ch. D. 562.

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any child, or the issue of any child, living at the decease of the survivor of them, or shall die without leaving any child, or the issue of any child, living at the decease of the survivor of their present or any future husband who may survive them respectively," then if the former event happened, the gift over would be good. But that is not what she has done. In each case the testatrix gives a moiety of residuary estate to her daughter for life, then to her present or any future husband for life, and then to the daughter's children living at the decease of the survivor of the daughter and her husband, and the issue then living of any child or children of the daughter who may have previously died, such issue taking their parents' shares. The gift is to a class not to be ascertained till the death of the survivor of the daughter and her husband present or future; and on failure of that class, the moiety is given over on the trusts of the other moiety. Then comes the clause on which the question arises: "And in case both my said daughters shall die without leaving any child living at the decease of the survivor of them or of the survivor of their respective present or any future husbands, then, after the death of such of my daughters as may happen to survive the other of them, and the death of the survivor of their respective husbands," the property is given over. I think this points to one event. That one event is referred to appears to me to be made clear by this, that the testatrix does not, after saying, "and in case both my daughters shall die without leaving any child, or the issue of any child, living at the decease of the survivor of them," begin again by saying, "or in case both my said daughters shall die without leaving any child, or the issue of any child, living at the death of the survivor of their respective husbands," but runs on, "or of the survivor of their respective present or any future husbands." It is a gift over on failure of a class to be ascertained at the death of the survivor of the daughters and their husbands present or future, and is bad for remoteness. It is not enough that you can separate the gift over so as to make it an alternative gift on two contingencies—the testatrix must herself have separated it so as to make it take effect on the happening of either of two events.

FRY, L.J.:—

I am of the same opinion. The true inquiry is whether the testatrix refers to one event or to two distinct events. "In case both my said daughters shall die without leaving any child, or the issue of any child, living at" (so far there is only a reference to a single event, and there is no reference to more than one till she comes to state the time at which the failure of issue is to take place) "the decease of the survivor of them or of the survivor of their respective present or any future husbands." I think that is not a true alternative, but that she means "at the death of the survivor of my daughters, or of the survivor of their husbands, whichever of those two survivors shall be the last survivor." The gift over was not to take effect until the husbands as well as the daughters were dead.

If the other parts of the will are referred to, they tend to confirm this view. The scheme of the will is to give a moiety of the estate to each daughter for life, then to her husband, if she should leave one surviving her, for his life, and then to a class of issue to be ascertained at the death of the survivor of the daughter and her present or any future husband. The ultimate gift over appears to amount merely to a gift on failure of all the prior limitations, some of which were void for remoteness.

LOPES, L.J.:—

I am of the same opinion.

Solicitors: *F. Berkeley Jarvis*, agent for *G. C. Livett, Cambridge; Maples & Co.; Walker, Son, & Field; Bridges, Sawtell, & Co.*, agents for *T. P. Bendall, Newmarket.*

H. C. J.

C. A.
1888
July 25.

In re BOMBAY CIVIL FUND ACT, 1882. *Ex parte* PRINGLE.

Bombay Civil Fund Act, 1882 (45 & 46 *Vict. c.* 45), *s.* 5—*Mode of Trial.*

On an application to the Court of Appeal under the *Bombay Civil Fund Act*, 1882, to prescribe the manner of trial of a question alleged by the Applicant to arise between him and the Secretary of State for *India* as to the liability of the fund, the Court will not enter into any inquiry as to the nature of the Applicant's claim.

Form of directions as to the manner in which the question shall be tried.

IN June, 1888, Mr. *Pringle*, a retired member of the *Bombay* Civil Service, applied to the Court of Appeal for directions as to the manner in which a question which he alleged to exist between him and the Secretary of State for *India* in relation to the *Bombay* Civil Fund should be tried, no General Orders as to the mode of procedure having been issued under the *Bombay Civil Fund Act*, 1882 (45 & 46 Vict. c. 45), s. 5 (1). On the 6th of June the Court directed notice to be served on the Secretary of State. Mr. *Pringle* accordingly served notice of motion that it might be ordered that the Applicant should within —— weeks lodge with the Registrar a written or printed statement of the facts on which he relied in support of his claims set out in a schedule to the notice, and that the Secretary of State for *India* might be ordered within —— weeks after such statement was lodged to lodge a written or printed statement in answer thereto, and that the Applicant might be at

(1) The *Bombay Civil Fund Act*, 1882 (45 & 46 Vict. c. 45), s. 5: "Provided that nothing in this Act shall prejudice any claim which may be made by any subscriber to or beneficiary under the said fund, or by the representatives of any such subscriber or beneficiary, upon the funds so transferred; and in case any question shall arise between any such subscriber, or the representatives of any deceased subscriber, or the widow or a child of any such subscriber, or the representatives of any such widow or child, on the one hand, and the Secretary of State for *India* in Council on the other, as to any liability or alleged liability of the said fund, such question shall be determined by Her Majesty's Court of Appeal in such manner as may be provided by any General Orders, or as the said Court may on special application think fit to prescribe, anything in the *Statute of Limitations* to the contrary notwithstanding."

liberty within —— weeks after such answer was lodged to lodge a reply thereto if he should deem it desirable so to do, or that such other order might be made in pursuance of sect. 5 of the Act as to the Court might seem just.

Moulton, Q.C., and *Macnaghten*, for the motion:—

No General Orders under the Act having been issued, the case must be tried in such manner as the Court of Appeal on special application may prescribe.

Robinson, Q.C., and *A. Young*, for the Secretary of State for *India*:—

We allege, by way of preliminary objection, that the Applicant has not shewn any case coming within sect. 5, and that there is no such "question" as is referred to in that section. Whatever he is entitled to, if anything, he can get under sect. 2 of the Act.

[FRY, L.J.:—You are asking us to exercise a power of stopping the matter *in limine*, which we should not have if General Orders had been made. We are only asked to direct the mode of trial, and can we look to what the Applicant's case is?]

He ought not to have directions given unless he shews a case coming within sect. 5. [*Edwards* v. *Warden* (1) was referred to.]

[FRY, L.J.:—It appears to me that the parties ought to proceed by statement of claim, statement of defence, and generally in the same way as if the proceeding had been an ordinary action, and the Court of Appeal a Court of first instance, and that the General Rules and Orders ought to be treated as applicable.]

Robinson, Q.C.:—The Applicant should give security for costs.

[FRY, L.J.:—It is not to my mind clear that we have any jurisdiction as to costs. If we have, we do not want an undertaking; if we have not, have we any power to require an undertaking?]

The Applicant ought to pay the costs of this application.

(1) 1 App. Cas. 281.

C. A.

1888

In re BOMBAY CIVIL FUND ACT, 1882. *Ex parte* PRINGLE.

FRY, L.J. :—

This is an application made to us to point out the manner in which a certain claim should be stated before us. The application arises under the 5th section of the *Bombay Civil Fund Act*, 1882. After providing for the transfer of the fund to the Secretary of State, the statute, by sect. 5, provides as follows:— [His Lordship read the 5th section.]

The present application is made to us simply because no General Orders have been issued which point out the manner in which the question may be raised, and we are only asked to prescribe in what manner it shall be raised. Now it is suggested on the part of the Secretary of State, that we ought to consider whether there is any valid question which the Applicant desires to raise. On the other hand it is suggested to us that we have nothing to do with the merits of the question at this stage. That is distinctly my view of the case. It is simply because no General Orders have pointed out the manner in which the question is to be tried, that we are asked to prescribe in what manner it shall be tried, and I think it would be premature to consider the validity of the claim at this stage. I think the most convenient order we can make is the one I have already pointed out, viz. to assimilate this proceeding to an ordinary action.

Another point has been raised—whether we can make any, and if any, what order with regard to the costs. It does not appear to me that the section in question gives any jurisdiction as to costs. It is to be observed that this is not an application to us by virtue of our general jurisdiction as Her Majesty's Court of Appeal, but it is under a special statute. I know of no power which we have, independently of statute, and of the general discretionary power which existed in certain Courts before the *Judicature Act* was passed, to pronounce any order as to costs. No doubt the matter is an important one, and one that may require further consideration, and therefore I only say at the present time that we make no order as to costs, not being at present satisfied that we have jurisdiction to make any.

LOPES, L.J. :—I entirely agree.

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The order was as follows:—

This Court doth order that the parties in this matter do proceed by statement of claim, defence, and reply, and generally as near as may be to the proceedings in an action, as though the *Judicature Acts* and the Rules of the Supreme Court, 1883, applied, and this Court were a Court of first instance, and the proceedings were an action commenced by writ served this day.

Solicitors: *Rowcliffes, Rawle, & Co.*; *Solicitor, India Office.*

H. C. J.

In re PARKER'S WILL.

C. A.
1888
Aug. 2.

Trustee—Trustee Relief Act—Payment into Court—Costs—Jurisdiction.

On applications for payment out of a fund which has been paid into Court under the *Trustee Relief Act*, the jurisdiction of the Court is limited to the fund which has been actually brought into Court; and repayment by the trustees of costs and expenses deducted by them from the fund before payment in cannot be ordered.

If it can be shewn that in such a case the costs and expenses have been improperly retained separate proceedings must be taken against the trustees to recover the amount.

IN this case Mr. Justice *Kay*, being of opinion that the trustees of a will, under which *Ann Parker* was absolutely entitled to a sum of £1400, had been guilty of very great misconduct in paying the fund into Court, and especially in the affidavit which had been filed by them on that occasion, had ordered them to pay all the costs of a summons by Miss *Parker* for payment out to her of the fund, and also to repay the costs and the commission which they had deducted from the fund before paying it into Court.

Miss *Parker* had for some time suffered from hysteria, bordering upon a state of unsound mind, and between May, 1875, and October, 1885, was an inmate of various lunatic asylums. In October, 1885, with permission from the medical superintendent, she left *Fisherton House Asylum*, near *Salisbury*, and for two years maintained herself, though in great poverty, and without applying to the trustees for the income of her legacy of £1400. In September, 1887, she was discovered by her sister, her only relative living in this country, and forcibly carried back to

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Fisherton Asylum. From that establishment she was shortly afterwards discharged by the visiting justices.

In December, 1887, the trustees paid the money into Court under the *Trustee Relief Act*, deducting a sum for their costs and expenses, and stating in their affidavit that in the opinion of the medical superintendents of the several asylums she was considered to be incurably insane, and that under the circumstances they believed "that she is still incurably insane and incapable of transacting business, or of giving a proper discharge for the said moneys and securities."

Miss *Parker* had applied by summons for payment to her of the fund in Court. In making the order for transfer Mr. Justice *Kay*, being of opinion that she had been treated in a most scandalous and disgraceful way, and also that the conduct of the trustees, in filing an affidavit which did not properly disclose to the Court facts as to *Ann Parker's* mental condition during the last two years within their knowledge, had been most discreditable, ordered them to pay all the costs of the summons for payment out, and to repay the costs deducted by them before paying the fund into Court.

The trustees appealed.

Renshaw, Q.C., and *Keary*, in support of the appeal:—

The trustees, acting upon the best medical advice that could be obtained, were fully justified in paying the money into Court. They cannot be ordered to refund costs which have been deducted by them from the fund before payment into Court; there being no jurisdiction in the Court over any portion except that which is actually brought into Court: *In re Bloye's Trust* (1); *Re Barber's Will* (2).

R. F. Norton, for the Respondent, *Ann Parker*:—

The Court has jurisdiction to order trustees who have vexatiously and improperly paid a fund into Court under the *Trustee Relief Act* personally to pay the costs of the petition for payment out by the persons entitled: *Re Woodburn's Will* (3).

(1) 1 Mac. & G. 488, 504.
(2) 9 Jur. (N.S.) 1098; 11 W. R. 1056.
(3) 26 L. J. (Ch.) 522; 1 De G. & J. 333.

[COTTON, L.J.:—Was the decision in that case directed to the question whether there was jurisdiction to order repayment by the trustees of what they had deducted for their costs before paying the fund into Court?]

It is there stated by Lord *Cranworth* that the *Trustee Relief Act* was not intended to give to a trustee an indemnity from the usual consequences of his improper conduct, and that it is a necessary incident to contentious litigation that the Court should have full authority to deal with the question of costs according to its discretion.

[*Renshaw*:—

In *Re Barber's Will* (1), *Kindersley*, V.C., states expressly that the question whether the Court had any jurisdiction over the fund not paid in was never raised in *Re Woodburn's Will* (2), and that their Lordships never meant to decide it.]

The trustees, at all events, were not justified in taking the expensive course of paying the fund in under the *Trustee Relief Act*, and thus throwing the costs upon the fund, when they should have proceeded by originating summons: *In re Birkett* (3).

[COTTON, L.J.:—I am not so certain that that would have been the cheaper course.]

On the merits, it is submitted that the view of the trustees' conduct taken by Mr. Justice *Kay* was correct.

COTTON, L.J.:—

I am unable to agree with the decision of Mr. Justice *Kay*. The trustees had not acted in an unreasonable or improper way in paying the money into Court, and, in my opinion, there was no ground for ordering them personally to pay the costs of the summons. With respect to ordering the trustees to repay the costs which they have retained out of the fund there is no jurisdiction to make such an order. If any case can be made that the costs have been improperly retained by the trustees, pro-

(1) 9 Jur. (N.S.) 1098; 11 W. R. 1056.

(2) 26 L. J. (Ch.) 522; 1 De G. & J. 333.

(3) 9 Ch. D. 576.

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ceedings should be taken against them to recover the amount. But, according to the clear opinion of Lord *Cottenham*, L.C. (*In re Bloye's Trust* (1)) and *Kindersley*, V.C. (*Re Barber's Will* (2)) the Court has no jurisdiction over any portion of the fund which has not been actually brought into Court, except by bill. The appeal must, therefore, be allowed.

FRY and LOPES, L.JJ., concurred.

Solicitors: *Robinson, Preston, & Stow*, agents for *Keary & Stokes, Chippenham; Ridsdale & Son*, agents for *Latchams & Montague, Bristol.*

F. G. A. W.

C. A. 1888 KAY, J. *July* 6. C. A. *Aug.* 1, 8.

In re DRY DOCKS CORPORATION OF LONDON.

Company—Winding-up—Voluntary Liquidation — Provisional Liquidator—Rates due after Appointment of — Distress — Priority — Carrying on Business for Benefit of Winding-up—Companies Act, 1862, *s.* 95 [*Revised Ed. Statutes, vol. xiv., p.* 223].

Between the dates of the appointment of a provisional liquidator on a winding-up petition and of a subsequent resolution by the company for a voluntary winding-up, the overseers of a parish proceeded, without the leave of the Court, to distrain for rates which had become due for the current half-year in respect of the company's premises:—

Held, by *Kay*, J., that the overseers were not entitled to the benefit of their distress; and that, as the rates were due before the commencement of the winding-up—that is, the passing of the winding-up resolution: *Weston's Case* (3)—the overseers were not entitled to any priority in respect of them, and that an injunction ought to be granted to restrain them from proceeding with the distress:

Held, on appeal, that as the overseers' right of distress was defeated only by the appointment of the provisional liquidator, the case was one where if leave to distrain had been applied for it would have been granted, and that an injunction ought only to have been granted on the terms of the liquidators paying the rates.

ON the 6th of March, 1888, a petition was presented by a creditor for the winding-up of the *Dry Docks Corporation of London, Limited*, and on the 8th of March an order was made appointing

(1) 1 Mac. & G. 504. (2) 9 Jur. (N.S.) 1098.
(3) Law Rep. 4 Ch. 20.

John Young provisional liquidator, with power to carry on the business of the company, and to take all such steps as might be necessary for that purpose.

On the 22nd of June last an extraordinary resolution was passed for the voluntary winding-up of the company, by which *John Young* and *Alexander Young* were appointed liquidators. On the following day an order was made continuing the winding-up under the supervision of the Court.

In April rates amounting to £125 5*s.* had been made by the overseers of the parish of *St. Anne's, Limehouse,* for the quarter ending at Midsummer last, in respect of two docks belonging to the company, called *Lime Kiln Dock* and *Bridge Dock.* The rates having fallen into arrear, a magistrates' order was made for a distress to issue if they were not paid within seven days. They were not so paid, and the overseers, on the 16th of June, proceeded, but without the leave of the Court, to levy a distress for the same upon the company's chattels. It did not appear on the evidence before Mr. Justice *Kay* that the overseers knew of the appointment of the provisional liquidator. The broker who made the distress deposed that on that day, after the goods had been valued, he saw the manager of the company, and at his request accompanied him to an office in *Coleman Street,* where the manager had an interview with a gentleman, the nature of which he did not know, but that after a time the manager came back and said the rates could not be then paid, but £10 was paid on account of the costs of the distress, on an agreement that the overseers would not sell before the 28th, on or before which day the balance was to be paid. It was in fact the provisional liquidator with whom the manager conferred. On the 28th of June the liquidators obtained an injunction, extending over July 6th, restraining the overseers from selling any of the company's property without the leave of the Court. On that day they moved to continue the injunction. The liquidators were in the possession or occupation of the company's docks, and it was stated in evidence that business was now being carried on there for the benefit of the company. They had on the 29th of June been appointed receivers and managers in an action brought by debenture holders.

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The motion was heard before Mr. Justice *Kay* on the 6th of July, 1888.

G. T. Millar, for the liquidators :—

It is clear that, in the winding-up of a company, no distress can be levied on the company's property without the leave of the Court, for that is an improper interference with the liquidator, who is an officer of the Court.

Eustace Smith, for the overseers :—

This case falls within that class of cases in which the business of the company is being carried on by the liquidator "for the beneficial winding-up" of the company under sect. 95 of the *Companies Act*, 1862, so that any costs incurred in so carrying on the business take priority over the claims of general creditors. The winding-up of the company in effect commenced with the appointment of the provisional liquidator, and this process of winding-up by him was included in the half-year at the commencement of which these rates became due.

G. T. Millar, in reply :—

It is well settled that rates due from a company before a winding-up are not entitled to priority. Here the winding-up did not commence until the 22nd of June, the date of the resolution for a voluntary winding-up : *Weston's Case* (1) ; and these rates were made and became payable in April previously.

KAY, J. :—

This motion raises a very curious and interesting point. I understand the facts to be these. On the 6th of March, 1888, a petition was presented for winding-up this company, and on the 8th of March a provisional liquidator was appointed under that petition. Rates became due for the quarter which began on the 25th of March and ended on Midsummer Day ; and, without knowledge of the fact that the provisional liquidator was in possession of the goods of the company, a distress was levied for these rates about the 16th of June. Now, no compulsory order to wind up

(1) Law Rep. 4 Ch. 20.

this company has been made; if there had, the compulsory order would have related back to the 6th of March, the date of the presentation of the petition; but on the 22nd of June an extraordinary resolution to wind up was passed, and subsequently to that a supervision order was made; and, of course then, according to *Weston's Case* (1) the winding-up began only on the 22nd of June. This distress was put in, though innocently and without knowledge that a provisional liquidator had been appointed, while the property was really in the custody of the Court by the provisional liquidator.

Now, what is the object of appointing a provisional liquidator under a petition which asks for a winding-up? The object is to keep things *in statu quo* and to prevent anybody from getting priority.

Then it is said most ingeniously: "Yes, that is true: but the provisional liquidator carries on the business for the benefit of the winding-up; and although he is put in to prevent creditors from getting priority, a creditor who becomes such after the provisional liquidator is appointed is a creditor in the winding-up in a sense." It has, no doubt, been held again and again that if a company during the winding-up retains possession of its premises, and rent or rates become due in respect of these premises while the company is in possession and is using them for the benefit of the creditors in the winding-up, any rent or rates which become due during that period ought to be paid in full; because, practically, the company in the winding-up is a tenant and is using the landlord's property, or incurring rates which are due in respect of that property, for the very purpose of benefiting the creditors who are winding-up. Now, is that the case when there is a provisional liquidator? I do not think it is so altogether. The provisional liquidator does not necessarily carry on the business for the purpose of winding-up. He cannot wind up: he cannot sell the property: he cannot get rid of it. He is only put in to prevent people from obtaining priority, and in no true sense can he be said to carry on the business of the company or to hold the property for the purposes of the winding-up. The winding-up in this case did not in fact begin till the 22nd of June, and the

(1) Law Rep. 4 Ch. 20.

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putting in of a distress was altogether a wrongful act, even if the overseers did not know that a provisional liquidator had been appointed; if they did know, it really was an interference with an officer of this Court which, in the case of a receiver at any rate, would amount to contempt. I cannot, therefore, allow the overseers to say that they got any advantage by putting in this distress.

Then another question remains. Supposing the overseers got no advantage by putting in the distress, can they say that these rates became due during the winding-up? That is impossible, because the winding-up did not commence until the 22nd of June, and therefore, although I think the argument ingenious, and the point a very curious one, my opinion is that in this case there is no priority for these rates, but that the overseers must come in and prove with the other creditors.

Accordingly the injunction must be continued, but I make no order as to costs, except that the liquidators may take their costs out of the estate.

G. I. F. C.

The overseers appealed. The liquidators filed an affidavit shewing that on the 14th of June a written notice of the appointment of a provisional liquidator had been given to a rate collector of the overseers. The Court offered the Appellants, who stated that when they put in their distress they had not any notice of the appointment, to let the appeal stand over for them to answer this affidavit, but they preferred letting the case go on.

The appeal was heard on the 1st of August, 1888.

Eustace Smith, for the appeal:—

I submit that these rates come within the principle of the cases where, property being occupied for the benefit of the company, rent accrued during the winding-up has been held payable in full as part of the expenses of the winding-up. Though as a general rule a voluntary winding-up does not go back beyond the date of the resolution for winding up, it may, where a provisional liquidator has been appointed before the resolution, be carried back to the appointment of the provisional liquidator:

In re Colonial Trusts Corporation (1); and I submit that this should be done here; and *Weston's Case* (2), which is always referred to for the general rule, does not conflict with that. If that be so, these rates accrued during the winding-up, and the liquidator cannot be allowed to get the benefit of the occupation of the property without bearing the burdens incident to it.

Millar, Q.C., and *G. T. Millar*, for the liquidator:—

We cannot dispute that this distress would have been good had there been no appointment of a provisional liquidator, but the fact that the assets were in the possession of a provisional liquidator makes it invalid. The winding-up commences only at the date of the resolution, and these cannot be considered expenses incurred during the winding-up: *Companies Act*, 1862, s. 130. By sect. 133 the assets are to be applied in satisfaction of liabilities *pari passu*, and the whole scheme of the Act is against giving preferences. Was this a liability of the company at the time of the resolution to wind up? If not, the company is not liable; if it was, then it is a provable debt, but there is no enactment authorizing the payment of it in full. The provisional liquidator is an officer of the Court: *Gooch's Case* (3); and no distress without leave of the Court could be of any effect: sect. 163.

COTTON, L.J.:—

This is an appeal from an order of Mr. Justice *Kay* made in the winding-up of this company, by which he restrained the Appellants from proceeding to enforce their distress by sale, and granted an injunction without imposing any terms upon the liquidator.

Now the case stands thus—the winding-up only commenced on the 22nd of June, because that was the date of the extraordinary resolution for voluntary winding-up, and an order was made on the following day continuing that winding-up subject to the supervision of the Court. A creditor's petition for winding-up had been presented on the 6th of March, and on the 8th a provi-

(1) 15 Ch. D. 465. (2) Law Rep. 4 Ch. 20.
(3) Law Rep. 7 Ch. 207.

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sional liquidator had been appointed, with power to carry on the business of the corporation until further order, and to "take all such steps as may be necessary for that purpose." The overseers caused a distress to be put in on the 16th of June, and, on the evidence now before us, I think we must take it that they did so with notice that a provisional liquidator had been appointed. They did not apply to the Court for liberty to put in the distress or to enforce it by subsequent sale, but some time after the supervision order had been made the liquidators applied to the Court for an injunction, which Mr. Justice *Kay* granted. I think that it was not right to grant it except on the terms of the liquidators paying the amount of the rate for which the distress was put in. I do not say so on the ground that the liquidation is to be considered as having commenced on the 6th of March, for the liquidation that is now being carried on commenced with the voluntary resolution, and must be considered as having commenced only from the 22nd of June. If there had been no provisional liquidator the distress put in on the 16th of June would have been a proper distress, and although sect. 163 of the *Companies Act*, 1862, says that after the commencement of the winding-up any distress put in force shall be null and void to all intents and purposes, yet that is to be construed with the previous sects. 85 and 87, and when there has been a distress put in before the commencement of the winding-up the Court may, if it thinks fit, allow it to go on. Here, if leave to distrain had been applied for, the Court would no doubt have given it, for these rates were due. There had been an order of the magistrates that if the rates were not paid within seven days there should be a distress, and there being no payment the distress was put in. The appointment of a provisional liquidator was for the purpose of protecting the property with a view to the winding-up of the company. It was only by this appointment that these goods were protected, and, if a winding-up order had been made on the petition, these rates would have been paid as part of the expenses incurred for the purpose of winding up the company. Then the liquidators under the voluntary liquidation, which commenced at a subsequent period, only get these goods in consequence of the provisional liquidator having been appointed, and although that is not

the liquidation for which the provisional liquidator was appointed, yet, in my opinion, if the liquidators take the benefit of having the goods preserved by means of the appointment, they ought to have been put on the terms of paying these rates if they asked for an injunction to prevent the distress being carried on to the sale of the goods. If they did not like to do that, then, in my opinion, the Judge should have allowed the sale under the distress to go on.

Then it is said the overseers did not apply, as they ought to have done, for the leave of the Court to put in the distress. It is true they did not, and they were wrong in that respect. But, in my opinion, they did not lose their right in consequence of their not having so applied. This distress was only wrong because there was the provisional liquidator, and if a winding-up order had been made the rates would have been paid as part of the expenses of carrying on the business. I do not think there was anything in the nature of contempt, and in my opinion the overseers did not, by taking a wrong course, lose the right they would have had if they had made the application. I think the proper order would have been to have granted the injunction only on the terms of the liquidators providing for payment of the rates for which the distress was put in.

Then there is this difficulty, that since the 22nd of June there has been a receivership order in an action, and we cannot now in the absence of the parties to that action give a right to the overseers to seize again and sell the goods of which they took possession before. I think the proper course is to let the case stand over, that the parties in the receivership action may be here, and then we can make such order as we think right with reference to the claim of the overseers.

FRY, L.J.:—

I am of the same opinion. It appears to my mind clear that in this case the voluntary winding-up commenced on the 22nd of June. It appears equally clear that the demand of the overseers accrued before the winding-up commenced. Therefore, *primâ facie*, the debt was one which ought to have been proved for and come in *pari passu* with the other claims against the

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company. But then there are circumstances which, in my opinion, vary the rights of the parties. On the 8th of March a provisional liquidator had been appointed. Now the provisional liquidator's appointment is not only provisional, but contingent in this sense, that it operates to protect the property for an equal distribution only in the event of an order for compulsory winding-up being made; and if no such order be made, then his appointment ought not to interfere with the rights of third persons. He was in the position of a receiver, whose appointment might interfere with the rights of third persons. Now with regard to that, the practice of the Court is perfectly plain, as was stated by Lord *Truro*, in the case of *Russell* v. *East Anglian Railway Company* (1), in very clear terms. He said: "I apprehend then it may be taken as a rule that, though this Court may have issued a process or have made an order which may interfere with the supposed rights and interests of other parties not parties to the cause, it is always competent for such parties to make an application to the Court for relief; and it is not to be presumed or doubted, but that justice will be duly administered to them on that application." I think, therefore, that if a proper application had been made the result would have been that the overseers would have been allowed to distrain, notwithstanding the appointment of the provisional liquidator. In point of fact, the overseers did not apply for that leave. Instead of that, they obtained distress warrants, and caused the goods to be seized and valued. But they did not sell. Their broker, on the 16th of June, saw the secretary of the company, who appears to have consulted the provisional liquidator, and thereupon a sum of £10 was paid by the secretary to the broker, and a promise was given that the rest of the money should be paid on the 27th or the 28th. Then on the 22nd of June comes the resolution to wind up the company. It appears to me, therefore, that what would have been the right course in this case to have pursued, viz. applying to the Court for leave to distrain notwithstanding the appointment of the liquidator, was prevented by this circumstance, that the voluntary winding-up had intervened. Therefore, although I think the course pursued by the Appel-

(1) 3 Mac. & G. 104, 118.

lants was not strictly the right one, yet I do not think that there was any intention of committing a contempt of Court, and I do not think that there was anything which deprived them of their pecuniary rights in respect of this property.

In my judgment we are bound to bear in mind this fact, that the appointment of the provisional liquidator defeated the right of distress of the Appellants, and that fact renders it, in my judgment, improper that this claim should be treated as being payable *pari passu* with the other claims. That being so, the order which was pronounced by Mr. Justice *Kay* cannot stand.

LOPES, L.J.:—

I am of the same opinion.

The case then stood over for a week, that it might be seen whether the parties to the debenture-holders' action would appear and submit to the jurisdiction, that the expense might be avoided of a separate application by the overseers in the action.

1888. Aug. 8. The parties to the debenture-holders' action appearing by counsel, and submitting to the jurisdiction, the Court discharged the order below, gave the receiver and manager liberty to pay the amount of rates to the overseers, and authorized the overseers to resume possession of the goods distrained, if the rates were not paid within seven days.

Solicitors: *Stibbard, Gibson, & Co.; Birchall, Wood, & Co.*

H. C. J.

C. A.
1888
Aug. 8.

In re HOWEL MORGAN.
OWEN *v.* MORGAN.

[1886 M. 880.]

Practice—Interrogatories—Rules of Supreme Court 1883, *Order* XXXI. *r.* 1.

The Plaintiff, as executrix of *A. M.*, sued the executor of *H. M.*, alleging that *H. M.* had received £6000 in trust for *A. M.*, had invested it in securities producing at least £5 per cent. per annum, and applied the interest to his own purposes. The Plaintiff claimed payment of the £6000 with interest at £5 per cent. The Defendant professed ignorance as to the matters alleged, and set up several alternative defences: that *H. M.* had not received the £6000; that if he had, he paid it to *A. M.*; that if he received it *A. M.* agreed that he should retain it for his own use as a gift from her; that if he received it, it was agreed between him and *A. M.* that he should retain it in satisfaction of a claim which he had against her; that *A. M.* was at her death indebted to *H. M.* in an amount exceeding the £6000. The Plaintiff delivered interrogatories for the examination of the Defendant. By interrogatory 18 he asked particulars as to the way in which the £6000 had been invested by *H. M.*, and what was the rate of interest on the investments, and how the income had been disposed of. By interrogatory 23 he asked whether the Defendant was not the brother of *H. M.*, and whether during the period of the transactions referred to in the statement of claim the Defendant had not been the solicitor and agent of *H. M.*, and lived with him, and acted as his confidential agent with respect to his property, and become acquainted with all his affairs. The Defendant, in answer to interrogatory 18, stated that *H. M.* had invested the £6000, and applied the income to his own purposes, and declined to answer further, and he declined to answer interrogatory 23 at all. *North*, J., ordered him to put in a further answer to both interrogatories:—

Held, on appeal, that as the Plaintiff was not seeking to follow the investments of the £6000, the Defendant was not bound to give the particulars of such investments; but that as the Defendant did not admit the receipt of £5 per cent. interest, he was bound to answer as to the amount of interest that had been received, as it would enable the Court at the hearing to make an immediate decree for payment of principal and interest if the Plaintiff established the trust.

Parker v. *Wells* (1) distinguished.

But *held*, by *Fry* and *Lopes*, L.JJ. (*dissentiente Cotton*, L.J.), that the Defendant was not bound to answer interrogatory 23, for that an interrogatory asking in substance whether the Defendant had not been in such a position that he must know whether the allegations in the statement of claim were true or false, did not relate to any matter in question in the cause within the meaning of Order XXXI. r. 1.

THIS action was brought by the executrix of *Anne Morgan* against the executor of *Howel Morgan*, the husband of *Anne*

(1) 18 Ch. D. 477.

Morgan. The statement of claim alleged that in 1869 *Anne Morgan* advanced out of her separate estate £6000, together with £1500 which she borrowed from her sister, to a colliery company, on the security of a debenture of the company for £17,500, which was taken in the name of *Howel Morgan*, as a trustee for *Anne Morgan*. That in 1873 the money secured by the debenture was paid to *Howel Morgan*, who repaid to the sister her £1500, but retained the £6000, and held it as a trustee for *Anne Morgan*; that *Howel Morgan* invested the £6000 in his own name, in investments which produced at least £5 per cent. interest per annum, and received and applied to his own purposes such interest; that *Anne Morgan* had repeatedly applied to him to repay to her the £6000 and interest, and he had promised to do so, but had never performed his promise. The Plaintiff claimed payment of the £6000, with interest at £5 per cent. from the time of its receipt by *Howel Morgan*.

The Defendant by his statement of defence denied that *Howel Morgan* received the £6000 as a trustee for *Anne Morgan*, if he received it at all, which the Defendant did not admit. Alternatively that if *Howel Morgan* received it, he paid it to *Anne Morgan*. Alternatively that if he received the same, *Anne Morgan* agreed that he should retain it for his own benefit, as a gift from her. Alternatively that if he received it, it was agreed between him and *Anne Morgan* that he should retain it in part payment of rents payable to him, which she had received and retained. Alternatively that *Anne Morgan* was at her death indebted to *Howel Morgan*, and that her estate was still indebted to him in an amount equal to the Plaintiff's claim, the particulars of which indebtedness were stated in a counter-claim accompanying the defence (see *In re Morgan, Owen* v. *Morgan* (1)).

The Plaintiff delivered interrogatories for the examination of the Defendant, two of which were as follows:—

"18. Upon what investments was the said sum of £6000 invested by the said *Howel Morgan*, or by the Defendant on his behalf, or how was the said sum of £6000 applied or disposed of? What was the rate of interest paid on such investments? What was the amount of income received by the said *Howel Morgan*

(1) 35 Ch. D. 492.

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from the said sum of £6000, or the investments representing it, for the year 1873, and for every subsequent year until his death, and how was such income applied or disposed of by him or on his behalf? Were the said investments transposed into any or what other securities, and when? What investments or securities represented the said sum at the death of the said *Howel Morgan?* What investments or securities now represent it?"

"23. Was not the Defendant a brother of the said *Howel Morgan?* Was he not his solicitor or agent from the time of his marriage, or from the year 1869, until his death, or for some other and what period? Did not the Defendant and the said *Howel Morgan* reside together from the month of November, 1869, until the death of the said *Howel Morgan,* or for some other and what period or periods? Did not the Defendant during this time, or for some other and what period, act as the confidential agent of the said *Howel Morgan,* with respect to all or some and what part of the moneys or property belonging to him, or in his possession, or under his control? Did not the Defendant conduct the correspondence of the said *Howel Morgan,* or some and what part thereof, and receive and pay all or some and what moneys on his behalf? Did not the Defendant on some and what occasions sign the name of the said *Howel Morgan* to dividend warrants and cheques, or other and what documents? Did not the Defendant become acquainted with all or some and which of the affairs of the said *Howel Morgan* in his lifetime? Did not the Defendant manage the affairs of the said *Howel Morgan,* or some and which of them?"

The Defendant answered these interrogatories as follows:—

"In answer to the 18th interrogatory. The sum of £6000 retained by the said *Howel Morgan* was invested, and the income thereof was received by the said *Howel Morgan,* and applied for his own purposes, and at divers times the investments of the said sum were disposed of by the said *Howel Morgan.* Save as aforesaid, I decline to answer the 18th interrogatory, on the ground that the matters thereby inquired after are not sufficiently relevant at this stage of the action.

"I decline to answer the 23rd interrogatory and every part

thereof, on the ground that the moneys thereby inquired after are not relevant to any of the matters in question in this action."

On 23rd July, 1888, Mr. Justice *North*, in Chambers, made an order for the Defendant to put in a further affidavit in answer to these two interrogatories. The Defendant appealed.

Warmington, Q.C., and *Upjohn*, for the Appellant:—

As regards interrogatory 18, we say that as the trust is disputed, the Plaintiff has no right at the present stage of the proceedings to ask for information as to the way in which the fund has been dealt with. Unless the trust is admitted, there is a preliminary question to be tried, and the Plaintiff is not entitled now to information which will be of no use at the trial, for it cannot help him to obtain a decree. In *Parker* v. *Wells* (1), such information was refused. Interrogatory 23 does not relate to any matters in question in the cause, and therefore need not be answered.

Cozens-Hardy, Q.C., and *Eyre*, for the Plaintiff:—

As to interrogatory 18, the information we ask for will be of use at the trial, for if we succeed in establishing the trust, this information will enable us to obtain an immediate decree for payment of principal and interest. If the Defendant will admit having made £5 per cent. per annum, we do not want interrogatory 18, but if he does not admit it, he ought to tell us what income was made. As regards interrogatory 23, we are entitled to have all information relevant to the issues to be tried, and where a Defendant professes ignorance as to the facts alleged, it is material to shew that he was in such a position that he must have known the truth as to the facts alleged.

Upjohn, in reply:—

To allow interrogatory 23 will be a repeal of the proviso at the end of Order XXXI. rule 1. This interrogatory does not relate to any matter in question in the cause, it is only directed at discrediting the Defendant's testimony.

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COTTON, L.J.:—

The 18th interrogatory, which is the first of the two we have to consider, goes too far, for as the Plaintiff is not seeking to follow the investments, the particulars of them cannot be relevant. As, however, the Defendant does not admit that interest amounting to not less than £5 per cent. per annum has been received, I think the Plaintiff is entitled to an answer to the question, what amount of income was received from the £6000 by *Howel Morgan* in 1873, and in every subsequent year. That I think is material, in order that the Plaintiff, if the Court decides the question of trust in her favour, may be able at the hearing to obtain an immediate decree for payment of the £6000 with such interest as the Court may consider her entitled to.

Parker v. *Wells* (1) was relied on by the Appellant, but that was a very different case. The plaintiff there asked for an account and payment of the profits made by the employment of a sum in trade, and no one who had practised in the Court of Chancery could imagine the possibility of such admissions being made as would enable the Court to make at the hearing an order for payment without any further accounts or inquiries.

As regards interrogatory 23, I did not at first think that the matters inquired after were relevant, but on further consideration it appears to me that they are. The Defendant sets up various defences, proceeding on the footing that he, coming in only as executor, knows nothing of his own personal knowledge as to the matters alleged in the statement of claim. It is material to the truth of that defence to ask him—Did you not live with the testator? Were you not his confidential agent? Did you not conduct his business correspondence? Were you not intimately acquainted with his affairs? It appears to me, therefore, that these questions ought to be answered. It is said that this is opposed to Order XXXI. rule 1; but it appears to me that inquiries as to facts which tend to shew that the defence which is set up is unfounded, ought not to be excluded because the matters inquired after are not directly relevant to the issues in the cause, but only tend to shew that the defence set up is not a real defence.

(1) 18 Ch. D. 477.

FRY, L.J.:—

As regards the 18th interrogatory, I can only express my concurrence with the remarks of the Lord Justice, but as regards the 23rd interrogatory, I have the misfortune to differ from him. I think that the intention of the 2nd proviso in Order XXXI., rule 1, was to confine interrogatories to matters at issue in the action: "Provided also that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness." The matters in question in the action are the receipt by the testator of a sum of £6000 held on trust for his wife, an alleged gift of it to him by his wife, and an alleged agreement between him and his wife relating to that sum. The knowledge or ignorance of the Defendant as to the matters alleged in the statement of claim and as to the truth of the allegations which he himself makes, is not one of the questions in the cause. It is true that it is material in this way—the Defendant says he does not know anything about the agreement or the other matters alleged, and it is material to shew that he was in such a position that he must have known whether the allegations are true or not. But the state of his knowledge is not a matter in controversy in the cause, and in my opinion, therefore, the 23rd interrogatory is against the 2nd proviso of Order XXXI., rule 1.

LOPES, L.J.:—

I also am of opinion, for the reasons stated by the Lord Justice *Cotton*, that the Defendant must give a further answer to the 18th interrogatory. As to the 23rd, I agree with the Lord Justice *Fry*. The questions contained in that interrogatory could be put in cross-examination, and the Defendant would be bound to answer them, but in my opinion they are not so material to the issues in the action as to be the proper subject of interrogatories. The Defendant alleges a gift by the testator's wife to the testator, but says at the same time that he has no personal knowledge whether it was made. There is no issue in the action as to his knowledge, and I think that an interrogatory, tending only to shew that he was in such a position that he must have known, cannot be allowed. I think that undue extension would be given

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to the practice of delivering interrogatories, if they were allowed to be used for the purpose of obtaining information on collateral matters.

The Defendant by his counsel now admitting that the income received from the £6000 had been not less than £5 per cent. per annum, it was ordered that no further answer to the interrogatories should be given.

Solicitors for Plaintiff: *Crouch, Spencer, & Edwards.*
Solicitors for Defendant: *Morgan, Son, & Upjohn.*

H. C. J.

C. A. 1888 *Aug.* 10, 11.

DAVIS *v.* GALMOYE.

[1880 D. 960.]

Practice—Attachment—Rules of Supreme Court, 1883, *Order* XLIV., *r.* 2.

An application in the Chancery Division for leave to issue a writ of attachment is not properly made by summons in Chambers, but should be made in open Court by motion.

APPEAL from an order of Mr. Justice *North* in Chambers giving the Plaintiffs leave to issue a writ of attachment against the Defendant for his contempt in not having complied with an order of the 11th of December, 1886, by which he was ordered, on or before the 24th of December, 1886, or subsequently within four days after service of the order on him, to pay into Court a sum of £713 3*s.* 3*d.*, being the balance certified to be due from him as trustee of the will of *William Davis*.

On the 10th of May, 1888, a summons for leave to issue a writ of attachment was taken out by the Plaintiffs, and on the 30th of July Mr. Justice *North* in Chambers made the order asked by the summons, but ordered that the writ should not issue for six weeks. No objection was then made to the exercise of the jurisdiction in Chambers.

From this order the Defendant now appealed.

Oswald, in support of the appeal, took two objections to the order: first, on the merits (not material for the purpose of this

report); and secondly, that leave to issue the writ of attachment ought not to have been given in Chambers. An order to commit to prison has always been made by the Judge in open Court, and is now only made on motion: *Daniell's* Chancery Practice (1); and attachment and committal are now placed on the same footing: *Harvey* v. *Harvey* (2). The Rules of Supreme Court (Order XLIV., r. 2; Order LII., r. 4) clearly contemplate that leave to issue a writ of attachment should be obtained on motion and not on summons, and this has been the practice in the Chancery Division: *In re Knight* (3). In *Salm-Kyrburg* v. *Posnanski* (4) it was held by Baron *Huddleston* and Mr. Justice *Grove* (*diss.* Mr. Justice *Day*) that a Judge at Chambers can give leave to issue a writ of attachment; but that decision (followed in *Amstell* v. *Lesser* (5)) was, I submit, founded on a wrong reading of sect. 39 of the *Judicature Act*, 1873, and the construction placed by Mr. Justice *Day* thereon was the correct one.

Upjohn, in support of the order.

COTTON, L.J., said that as the objection had not been raised before Mr. Justice *North* the Defendant was not entitled to raise it on appeal. But as the point had been argued, he thought it right to state his opinion that the application for leave to issue a writ of attachment ought to have been made by motion in open Court, and not by summons. According to the practice in the Chancery Division, applications by summons were brought in the first instance before the Chief Clerk, and could then be adjourned to the Judge. The Judge was the only proper person to deal with motions of this kind, and it was better that it should be dealt with in open Court. Upon the merits there was no ground for interfering with the discretion exercised by Mr. Justice *North*, and the appeal would be dismissed with costs.

FRY, L.J., concurred.

Solicitors: *Galmoye & Co.; Watson, Sons, & Room.*

(1) 6th Ed. 892.
(2) 26 Ch. D. 644, 654.
(3) W. N. (1883), 162.
(4) 13 Q. B. D. 218.
(5) 16 Q. B. D. 187.

F. G. A. W.

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June 9, 11.
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Aug. 6, 7.

In re SOUTH LONDON FISH MARKET COMPANY.

Company—Director—Member—Statutory Company—Statutory Directors and Members—Transfer by Directors in order to escape Liability of Shares allotted as Qualification—Company formed by Act of Parliament for Public Benefit—Winding-up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 199 [*Revised Ed. Statutes, vol. xiv., p.* 247].

By a special Act of Parliament, passed in 1882, eight persons were incorporated into a company, and were made first directors thereof, "to continue in office until the first ordinary meeting held after the passing of the Act." The company was not registered under the *Companies Act*, 1862. No ordinary meeting of the company was ever held; and in 1887 an action was brought against the company to recover certain penalties payable under the Act. While the action was pending the eight first directors held meetings at which they allotted to themselves their qualifying shares, paid a call thereon, and applied the money in payment to one of them of preliminary expenses which under the Act were payable by the company, but which he had paid or was liable to pay. Five of them then transferred their shares to another of them in consideration of money paid to the transferee. Judgment was given against the company in the action, and the Plaintiffs presented a petition for the winding-up of the company:—

Held, by *Kay*, J., that the transfers of their shares by the five directors being for the purpose of escaping their liability, were fraudulent and void, and that therefore there were in fact eight members of the company, and the Court had jurisdiction under sect. 199 of the *Companies Act*, 1862, to make a winding-up order;

And *held*, by the Court of Appeal, in dismissing an appeal by the company, that the special Act imposed upon the eight persons incorporated thereby the statutory obligation of continuing directors and members of the company until the first ordinary meeting, and, no such meeting having been held, that such eight persons still continued members of the company, and consequently that the Court had jurisdiction to make a winding-up order.

Per Cotton, L.J.:—The word "members" in s. 199 of the *Companies Act*, 1862, does not necessarily mean "shareholders."

By the *South London* (*Elephant and Castle*) *Market Act*, 1882 (45 & 46 Vict. c. cxliv.), it was recited in the preamble as follows: "Whereas the establishment of a market for the sale of fish and other provisions, articles, and commodities, in a convenient position near the *Elephant and Castle Tavern*, in the parish of *Saint Mary, Newington*, in the county of *Surrey*, would be advantageous

to the inhabitants of that neighbourhood and of the southern part of the metropolis generally: and whereas the persons in this Act named with others are willing at their own expense to undertake the establishment of such market, and it is expedient that they be incorporated into a company, and that the necessary powers be conferred upon them for that purpose." By sect. 2 the *Lands Clauses Consolidation Acts*, 1845, 1860, and 1869, and the *Markets and Fairs Clauses Act*, 1847, were incorporated. By sect. 4, *Samuel Plimsoll* and seven other persons named (being subscribers to the undertaking) and all other persons and corporations who had already subscribed or should thereafter subscribe to or become proprietors in the undertaking were "united into a company for the purpose of making and maintaining the market," and were incorporated by the name of the *South London Fish Market Company*. By sect. 5 the company were authorized to construct a market on the site shewn on the plans deposited under the Act. By sect. 7 the capital of the company was declared to be £250,000, in 10,000 shares of £25 each. By sect. 14 the first ordinary meeting of the company was to be held within six months after the passing of the Act. By sect. 15 the quorum of general meetings of the company was to be five shareholders holding in the aggregate not less than one-twentieth of the capital of the company. By sect. 16 it was provided that the number of directors should be eight, but that it should be lawful for the company, from time to time, to reduce the number, provided that the number were not less than three. By sect. 17 the qualification of a director was declared to be the possession in his own right of not less than forty shares. Sect. 19 was as follows:—"*Samuel Plimsoll*" . . . (and the seven other persons above-mentioned) "shall be the first directors of the company, and shall continue in office until the first ordinary meeting held after the passing of this Act. At that meeting the shareholders present in person or by proxy may either continue in office the directors appointed by this Act or any of them, or may elect a new body of directors, or directors to supply the place of those not continued in office, the directors appointed by this Act being, if qualified, eligible for re-election, and at the first ordinary meeting to be held in every year after the first ordinary meeting, the shareholders

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present in person or by proxy shall (subject to the power hereinbefore contained of reducing the number of directors) elect persons to supply the places of the directors then retiring from office, agreeably to the provisions in the *Companies Clauses Consolidation Act*, 1845, contained, and the several persons elected at any such meeting, being neither removed nor disqualified nor having resigned, shall continue directors until others are elected in their stead in manner provided by the same Act." By sect. 38, after recitals that it was desirable to make provision for proper approaches to the market, and that a plan shewing the same had been prepared and had been signed by the clerk to the vestry of the parish of *St. Mary, Newington*, on behalf of that vestry, and by *S. Plimsoll* on behalf of the company, and had been deposited with the said clerk, and that it had been agreed that the following provisions should have effect and be binding on the company, it was provided that the company should, by the 31st of March, 1886, acquire land and execute works in the nature of street improvements as shewn on the plan, and in the event of their failing to do so should forfeit a sum of £50 for each and every month or part of a month during which they should fail to have made a certain new street, and to have cleared the lands necessary for the widening of two other streets, and to have delivered over such lands so cleared to the vestry, such penalty to be paid to the vestry, and applied in reduction of the general rates of the parish, and to be recoverable with costs by action in the High Court of Justice. By sect. 40, the costs, charges, and expenses preliminary to, and of and incidental to the preparing, applying for, obtaining, and passing of the Act were to be paid by the company.

This Act received the royal assent on the 24th of July, 1882.

The company failed to acquire any land or to construct the market or any part of the works specified in sect. 38.

In June, 1887, the vestry of *St. Mary, Newington*, commenced an action against the company to recover penalties under sect. 38 of the Act, and on the 21st of March, 1888, judgment was given against the company for £750, the amount of such penalties.

No ordinary meeting of the shareholders was ever held, but on the 19th of July, 1887, a meeting of the directors took place

at which four directors were present and *Plimsoll* took the chair. At that meeting the directors present allotted to each of the first directors forty shares, being the number of shares which constituted the qualification of a director, and made a call of £5 per share thereon. This call was paid on the 20th of July, 1887, but one of the directors (who was stated to be a clerk of *Plimsoll's*) paid up the full amount of his shares, viz., £1000.

On the 21st of July, 1887, another meeting of the directors was held, *Plimsoll* again being chairman, at which the secretary reported that £2400 had been received for calls, and a resolution was thereupon passed that this sum should be paid by the company on account of the costs, charges, and expenses of obtaining the Act which *Plimsoll* had paid or had made himself liable to pay. On the same day that sum was handed to *Plimsoll*, and thereupon he and four other of the directors transferred their shares to *Leigh*, who was another of the directors, and a clerk of *Plimsoll's*. The transfers were expressed to be made in consideration of £4 paid to, not by, *Leigh*.

No other shares in the company were ever subscribed for or issued.

On the 24th of March, 1888, the vestry being unable to obtain payment of their judgment debt, presented this petition under the *Companies Acts*, 1862 and 1867, for the winding-up of the company.

Upon being served with the petition the solicitors of the company wrote to the solicitors of the petitioners objecting that as there were then only three members of the company no winding-up order could be made under the last-mentioned Acts.

The petition came on for hearing before Mr. Justice *Kay* on the 12th of May, 1888.

Marten, Q.C., and *E. Beaumont*, for the petitioners, the vestry of *St. Mary, Newington* :—

The transfers of their shares by the five directors were altogether invalid, and there are, therefore, now eight members of the company, and the Court has jurisdiction under sect. 199 of the *Companies Act*, 1862, to make a winding-up order. These shares were qualification shares which the directors were under a statutory

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obligation to take: *Kincaid's Case* (1); *Forbes' Case* (2); and which by sect. 17 of this Act they were bound not merely to take, but to possess. It was not competent for them, while they remained directors, to transfer the shares. It was held by Lord *Romilly*, M.R., in *Gilbert's Case* (3), that a director cannot transfer his qualifying shares; that case was affirmed on appeal on different grounds, but *Giffard*, L.J., observing that in a variety of cases a director was as free to deal with his shares as any other person, qualified this by adding "except perhaps his qualification, which he cannot deal with without giving up his directorship." The burden lies on these directors to shew that they have got rid of their statutory liability. The transfers were a mere sham, which could not free them from that liability. They were made pending the action against the company for the purpose of escaping liability, and of defeating the right of the Petitioners under their statutory contract with the company, and being made in the private interest of the directors themselves, were fraudulent and void: *Sykes' Case* (4); and the Court upon this petition will treat them as nullities. The Court is not bound by the state of the company's register. If such a proceeding as this were allowed, in every case the members of an unregistered company might defeat the process of this Court by transferring their shares.

[Kay, J., referred to the observations of Lord Justice *Fry* in *In re Free Fishermen of Faversham* (5).]

The Court has jurisdiction in a proper case, and in the absence of an express statutory remedy, to wind up a company formed for the public benefit: *In re Exmouth Docks Company* (6). This market has never been constructed and never can be, and it is for the public benefit that the company should be wound up.

Ince, Q.C., and *Haldane*, for the company:—

The transfers were valid and effectual, and the number of the members of the company being reduced below seven, the Court has no jurisdiction to make a winding-up order: *In re Bolton*

(1) Law Rep. 11 Eq. 192.
(2) Ibid. 19 Eq. 353.
(3) Ibid. 5 Ch. 559.
(4) Law Rep. 13 Eq. 255.
(5) 36 Ch. D. 329, 347.
(6) Law Rep. 17 Eq. 181.

Benefit Loan Society (1). Under the *Companies Clauses Act*, 1845, it is the right of every shareholder to transfer his shares to whomsoever he pleases: *De Pass's Case* (2). He may pay the transferee for taking them: *Slater's Case* (3): and so long as the transfer is out and out the Court accepts it as an exercise of the shareholder's right, and cannot go behind it. *Gilbert's Case* (4) is no authority for the proposition that a director cannot transfer his qualifying shares: the ultimate decision of that case proceeded on the ground that the directors there had postponed the formal declaration of a call in order to assist one of their number to transfer his qualifying shares. The *dictum* of *Giffard*, L.J., is ambiguous. It may mean that a director must first resign his directorship before he can transfer his qualifying shares, or it may mean that if a director transfers those shares he thereby resigns his directorship. The latter is the true meaning. The word "qualification" implies that the qualified person by parting with his qualification becomes disqualified. These five directors by making these transfers ceased to be directors, and they never afterwards acted as such. There is no equity on the part of any shareholder to insist on another shareholder retaining his shares: *De Pass's Case* (5), nor is there any duty cast on a director to retain his qualification for ever. If a transfer of shares is made out and out, it must be valid, unless tainted with fraud *quâ* the company: *Buckley* on the Companies Acts (6). In *Gilbert's Case* and all the other cases in which transfers for the purpose of avoiding liability have been held void there was a fraud on the company; in the present case there was no fraud on the company.

KAY, J. (after referring to the provisions of the special Act, continued):—

The preliminary expenses had not been paid by the company, and the directors took a course which, so far as I know, is entirely novel, and reflects credit on the ingenuity, if not on the morality, of those who advised the company. Mr. *Plimsoll*, it seems, had paid or was liable for the preliminary expenses, and was very

(1) 12 Ch. D. 679.
(2) 4 De G. & J. 544.
(3) 35 Beav. 391.
(4) Law Rep. 5 Ch. 559.
(5) 4 De G. & J. 544, 558.
(6) 5th Ed. pp. 25, 26.

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desirous of having this liability discharged out of the funds of the company. Each of the directors took the forty shares which by the Act of Parliament he was required to take as his qualification. Probably even if there had been no actual allotment of shares to them, they would have been shareholders by virtue of the Act of Parliament; but it is not necessary to consider that, because it is admitted that they were shareholders. By certain payments made upon their shares they provided a fund to diminish the liability of Mr. *Plimsoll* by payments to him. That having been done, and while they were still directors, five of them, including Mr. *Plimsoll*, transferred their shares to one person, and each transfer expressed, not that the transferee paid money for the shares, but that the transferor paid him money to take them, and that was done after an action had been commenced by the Petitioners, the vestry of *St. Mary, Newington*, against the company to recover penalties under sect. 38 of the Act. The action was defended, but the vestry recovered judgment. The enactment amounts to a contract between the vestry and this company, and accordingly the penalties were recovered. It was pending that action, and for the obvious purpose of defeating it, that these directors transferred their qualification shares in the way which I have described. So that they availed themselves of their powers and position as directors and of these qualification shares, which were the only property, so far as I am informed, that the company ever had, and of the liability which they themselves had on the shares, to make payments to Mr. *Plimsoll* in order to relieve him of part of his liability in respect of the preliminary expenses, and then for the purpose of defeating the process of this Court and defeating the creditors, who had a pending action against them, in which judgment was subsequently obtained, they made these transfers to a nominee, paying him money to induce him to take them. Probably the nominee is a man of straw, but that does not matter. One reason why they did so was this. This company, not being registered under the *Companies Act*, 1862, was, under sect. 199, only subject to be wound up if it consisted of more than seven members. Therefore the ingenious person who devised this trick in effect said: "Now you can effectually get rid of your liability under

the special Act, and probably ultimately defeat this action which is pending against you for moneys which by the Act you have contracted to pay to the extent of your liability on your shares, by transferring your shares, so that when proceedings are attempted by *scire facias*, you may say that you are not shareholders, or when an application is made in the Court of Chancery to wind up the company, you may say that there are not seven members." I do not know whether they really believed that the Court would be so easily defeated as that. It has been held again and again that a transaction by which shares are voluntarily transferred to a third person—that is, without consideration for the transfer—may be good under certain circumstances. A *bonâ fide* and out and out transfer may be good; but there must be these two elements: it must be an out and out transfer, and it must be *bonâ fide*. I am of opinion that this transaction was not *bonâ fide*, but was a distinct fraud, and for this reason. It was held in the year 1870 by Lord *Romilly* and Lord Justice *Giffard* in *Gilbert's Case* (1), that a transfer of his qualification shares by a director was an improper proceeding. Lord *Romilly* said: "Whether a director can do that"—that is, transfer his qualification shares—"is a question which has never yet been determined, and I apprehend that he cannot. His situation is that of trustee for the shareholders, and therefore he is not at liberty to do things which he does not think for the benefit of all the shareholders of the company—still less may he do so to gain pecuniary advantage to himself." That case went on appeal before Lord Justice *Giffard*, and he said: "I quite agree that because a man is a director he is not necessarily a trustee of the shares he holds for the general body of shareholders; and in a vast variety of circumstances he is just as free to deal with his shares—except perhaps his qualification, which he cannot deal with without giving up his directorship—as any other person." So that I have the authority of two eminent Judges that a director cannot deal with his qualification shares as freely as he may with other shares. Looking at the doctrine of this Court, that a voluntary transfer to escape liability in some cases is a fraud, I cannot doubt that a director voluntarily transferring his

(1) Law Rep. 5 Ch. 559.

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qualification shares in order to escape liability is committing a fraud.

The doctrine to which I have referred seems to me, if I may say so respectfully, a very proper one to hold, and not only do I feel myself bound by these *dicta* which I have read, but I most heartily concur in them. I think this is precisely the case in which these *dicta* apply, and that in this case a trick has been attempted, which really is a fraud upon the present Petitioners, and which was intended to defeat and embarrass them, and prevent them recovering their debt. I accordingly hold that these transfers, being fraudulent, are entirely void, and that there are in fact eight shareholders in this company.

Then the question arises whether I ought to make an order for the winding-up of this company. Now the only hesitation I have about it at all is this, that one of the learned Judges in the case of *In re Free Fishermen of Faversham* (1) thought that where an Act was passed for the formation of a company, which Act, on the face of it, declared the undertaking to be intended for some benefit to the public, there might be a question whether the Court would in its discretion wind up such a company. I certainly know of no other authority for that proposition. It seems to me that, whether an Act is intended for the benefit of the public or not, if it forms a company which becomes indebted and cannot pay its debts, it is much more for the benefit of the public that the company should be wound up than that it should be allowed to carry on a lingering existence, without paying its debts. However, that point, it seems to me, does not really arise in this case, because not only has this company not acquired a market, but it is entirely impossible that it ever should do so. It was formed long ago, in the year 1882, and up to this time it never has obtained a single shareholder beyond those who were the promoters of the company, and who are incorporated and named in the Act, and the amount which is left payable on their shares would not be anything like enough to found a market. Therefore the foundation of a market is proved to be quite impossible. The company has never carried on business from the date of the Act to this time, and it is clearly within the powers

(1) 36 Ch. D. 329, 347.

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of the Court to wind up the company for many reasons; and certainly the public interest, if that ought to be considered, would not be in the least degree interfered with by such winding-up.

Another circumstance which I have considered is this. There is a remedy by *sci. fa.*, but then, if the judgment creditors were now to proceed by *sci. fa.*, they would be met by these transfers, and some proceeding must be taken to set the transfers aside or prove their invalidity before the matter could be worked out. I have got the whole matter before me, and it seems to me, on the whole, that this is as advantageous a way of doing it as any other. Although there might be a remedy by *sci. fa.*, I think the company comes within the 199th section of the Act, and I therefore make the usual winding-up order.

C. C. M. D.

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The company appealed; the appeal came on for hearing on the 6th of August, 1888, and in addition to the arguments used and authorities cited before Mr. Justice *Kay*, as above reported, the following arguments were addressed to the Court.

Ince, Q.C., and *Haldane*, for the Appellants:—

The *Companies Clauses Act*, 1845, recognises no person other than, and distinct from, a shareholder, as being, or capable of being, a "member" of a company. There is no such thing as a register of members as distinct from shareholders; and membership ceases on assignment of the member's shares. So the word "members" in the 199th section of the *Companies Act*, 1862, must mean and be read as synonymous with "shareholders:" *Poole, Jackson, & Whyte's Case* (1); *Société Générale de Paris* v. *Walker* (2); *In re Bolton Benefit Loan Society* (3).

Marten, Q.C., and *E. Beaumont*, for the Respondents:—

The eight persons incorporated and made directors of the Company by the special Act are statutory members, with a statutory liability to continue members and directors of which they have never got rid. They are still directors, and must be deemed to be members of the company to the extent of their

(1) 9 Ch. D. 322. (2) 11 App. Cas. 20.
(3) 12 Ch. D. 679.

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qualification shares. Upon this point the case is governed by *Portal* v. *Emmens* (1), where the form of the special Act was the same as in this case. [They also referred to *Scott* v. *Berkeley* (2) and *Kipling* v. *Todd* (3).]

During the argument, and in answer to a question from the Court, it was admitted by counsel for the Appellants that the meetings of the 19th of July and the 21st of July, 1887, were neither of them general meetings of the shareholders of the company, and that in fact no "first ordinary meeting" had ever been held after the passing of the special Act within the meaning of clause 19 thereof.

Haldane, in reply:—

A man can be a director without being a shareholder, and by the terms of this special Act these eight men were made "first directors," but not shareholders. They were merely the hands to guide the company at its outset. The qualification clause applies not to the "first directors," but to the directors to be subsequently appointed; and sect. 19, which expressly states that "the directors appointed by this Act" are "if qualified, eligible for re-election," must have contemplated either that the eight first directors, or some of them, may never have had shares sufficient for a qualification, or that they may have validly parted with them. There is nothing here to deprive the original directors of their legal right to assign the shares which were allotted to them, and in the absence of fraud a man's motive for the exercise of a legal right is immaterial.

Cotton, L.J.:—

This is an appeal from a winding-up order made by Mr. Justice *Kay*, and the only question we have to consider is whether in the case of this company the Court had any jurisdiction to make such an order. The company, not being a registered company, can only be wound up under sect. 199 of the *Companies Act* of 1862, which applies to companies consisting of more than seven members

(1) 1 C. P. D. 201, 664. (2) 3 C. B. 925.
(3) 3 C. P. D. 350.

and not registered under that Act. Now the contention on the part of the Appellants is that at the time the winding-up order was made this company had not got seven members, but had only got three; for there had been originally eight persons incorporated, and five of them had transferred their shares for the purpose of preventing the judgment creditors, who are the Petitioners in the case, from getting payment by means of a winding-up order.

It was contended that the expression "members" in the 199th section of the Act must mean holders of shares. I think, however, that cannot be so, because even under the Act of 1862 it was not necessary that any company should have shares at all; and certain companies, such, for instance, as are formed on the principle of guarantee, do not have any shares. In the case of such companies, where one member guarantees, say £100, another £500, another £1000, the liability of the members is not limited by the amount of their shares, for they have none, but each member in proportion to the amount he guarantees is liable to contribute to the debts of the company. There may also be unlimited companies in which there is no necessity for any shares whatever; accordingly I cannot here read that word "members" as equivalent to shareholders, that is to say, persons holding shares in the company. If, then, that is not the true meaning of the word "members," it is not necessary to enter into the question as to whether these five members who purported to transfer their shares are to be considered as still holders of shares. To my mind, as I pointed out very early in the argument, we have not to consider on this appeal whether these transfers can be set aside as fraudulent or otherwise voidable, but to see whether under the special Act of Parliament the attempt to reduce the number of members below seven has been effectual. Now the special Act, in sect. 4, incorporates the eight gentlemen named, "being subscribers to the undertaking," which, I think, means not that they are incorporated on the condition of their subscribing to the undertaking, but on the footing, or on the representation made, that they had subscribed to the undertaking. Then the section goes on: "And all other persons and corporations who have already subscribed, or shall hereafter subscribe to or become proprietors in the undertaking, and their executors, administrators,

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successors, and assigns, shall be and are hereby united into a company." Now, from the passing of this Act in 1882 down to July, 1887, these gentlemen never met, and never took any shares whatever. But they were called into sudden activity on the 19th of July, 1887, and on that day some of these gentlemen who were made directors by the Act met for the first time, in order to raise a sum of money for the purpose of paying one of their number what he said had been expended in preliminary expenses. They then allotted to each of the eight directors forty shares in this company; and on the 21st of July a sum of £2400, which had been paid into a bank in respect of these shares, was ordered at once to be paid out to one of their number, Mr. *Plimsoll*, for his expenses. Then immediately afterwards, on the same day, five of the eight transferred their shares to one of their number, who, I suppose, was not the most wealthy man amongst them. Now could they in this manner reduce the number of members of this company below seven? I think that question depends on sect. 19 of the special Act, which says this: "*Samuel Plimsoll*" and seven other gentlemen named, being the eight persons who are incorporated, "shall be the first directors of the company, and shall continue in office until the first ordinary meeting held after the passing of this Act."

It was at first contended by Mr. *Haldane* that the meeting of some of these eight persons, which was held on the 19th of July, was "the first ordinary meeting," but on consideration he gave up that contention, and, in my opinion, it certainly could not be maintained that that was the first ordinary meeting; because under clause 15, as to the quorum of general meetings, five shareholders must attend in order to form a quorum, and amongst these eight gentlemen they did not succeed in getting together that number. Accordingly, the meeting was not, and did not purport to be, a meeting of members, who, for the "first ordinary meeting," must be shareholders, but it merely purported to be, and was, a meeting of the directors to act as such in their position as directors. The "first ordinary meeting" contemplated by sect. 19 has accordingly never been held. What, then, is the consequence? There is an obligation imposed on these eight gentlemen to continue in office until the first ordinary meeting

after the passing of the Act. I do not decide, and it is not necessary to decide, the question whether this Act of Parliament requires that each of these gentlemen should take these shares as his qualification. That would be in accordance with *Portal* v. *Emmens* (1), and I cannot see any substantial distinction between the Act of Parliament in that case and the Act which we have to construe here. If that be so, there is here a statutory obligation to continue to be directors, and to be the holders of shares until the specified time. It may be that the proper construction of this section is that there is a parliamentary fetter upon them, obliging them to continue to hold their shares. I rather doubt whether that is so, because the 19th section says that at the first ordinary meeting the directors appointed by the Act, "if qualified," shall be eligible. But, at all events, they are by this Act of Parliament incorporated by name with the obligation of being directors, and, in my opinion, they could not get rid of the membership thus imposed upon them so long as they were directors. If they could, and there were no fetter on their transferring their shares, then under the special terms of this Act of Parliament they would still continue members of the company, even though they might have parted with the shares the possession of which would, under ordinary circumstances, be the test whether they continued to be and were members of the company.

In my opinion, therefore, this attempted transfer of their shares was an act which was contrary to the provisions of this private Act of Parliament, or, if that is not so, then that, having regard to sect. 19, they still remain, as directors, members of the corporation, and therefore have not effectually reduced the number of members below seven. In my opinion, therefore, the order of Mr. Justice *Kay* was right.

FRY, L.J.:—

The question we have to determine arises under the 199th section of the *Companies Act*, 1862. The inquiry is this: Did the company in question consist, at the date of the presentation of the petition, of more than seven members? It is said by the Appellants that it did not; it was said by the Respondents that it

(1) 1 C. P. D. 201, 664.

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consisted of eight. The statute which regulates the company in question by its 4th section enacts that eight persons, who are named, "shall be and are hereby united," together with other persons to come in, "into a company," and "shall be a body corporate." Those eight persons, therefore, are in my judgment, statutory members of the company—statutory corporators. The 19th section provides that the same eight persons shall be the first directors of the company, and shall continue in office until the first ordinary meeting held after the passing of the Act. No ordinary meeting has been held after the passing of the Act.

Now the effect of the 19th section, in my judgment, is to make the corporators, because they are members of the corporation, and because they are members of the company, directors, and to require that they shall as members of the company, as corporators of the corporation, continue in office until the first ordinary meeting. Until that meeting is held, therefore, the statute has made them, in my judgment, members of the company, corporators in the corporation, and directors of the company. Till that meeting is held, they cannot, I think, get rid of any of these characters, and therefore there were more than seven members of the corporation at the time of the presentation of the petition. The appeal must accordingly be dismissed.

Lopes, L.J.:—

Unless there were seven members of this company at the time of the presentation of the petition the Court would have no jurisdiction to wind the company up.

By the special Act eight gentlemen were originally united into a company, and made directors of it. Five of them, in July, 1887, transferred the qualification shares which had been allotted to them to a Mr. *Leigh*, with the object, as it is conceded, of getting rid of their liability under the special Act. The question we have to consider is whether, notwithstanding this transfer of shares, seven of these gentlemen continued to be members of the company. I am of opinion that they did. I think the question depends on sect. 19 of the special Act. That section seems to me to be clear and imperative, and under it the eight gentle-

men named therein are to be the first directors of the company, and "shall continue in office until the first ordinary meeting held after the passing of this Act." Now, it is also admitted that no first general meeting was ever held. I am therefore of opinion that these gentlemen continued to be members. They were statutory corporators, they were statutory directors, and in my opinion it would be impossible to say that they were not members of this company. There were therefore more than seven members at the time of the presentation of the petition, and I think there was jurisdiction to wind up the company.

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Solicitors: *C. & S. Harrison & Co.*; *Lowless & Co.*

W. W. K.

BOSTON DEEP SEA FISHING AND ICE COMPANY *v.* ANSELL.

[1886. B. 5330.]

C. A. 1888 KEKEWICH, J. *Jan.* 12, 13, 14, 26, 27, 28, 30, 31; *Feb.* 1. C. A. *June* 25, 26, 27.

Principal and Agent—Master and Servant—Managing Director—Profit made by Agent—Commission—Dismissal of Servant for Breach of Duty—Salary for current Period.

The promoter of the Plaintiff company agreed with the Defendant that he should be employed as managing director of the intended company for five years at a yearly salary. By the articles of association it was provided that the Defendant should be managing director for five years at the yearly salary mentioned in the agreement, payable quarterly. Afterwards the company by a written instrument adopted the agreement between the promoter and the Defendant.

The Defendant, on behalf of the company, contracted for the construction of certain fishing-smacks, and, unknown to the company, took a commission from the shipbuilders on the contract. Several months afterwards the Plaintiff company at an extraordinary meeting passed a resolution dismissing the Defendant from his office on the ground of other alleged acts of misconduct, which they were not able to substantiate in the action: being at that time ignorant of his receipt of the commission from the shipbuilders.

The Defendant was a shareholder in an ice company and a fish-carrying company, which paid, in addition to the ordinary dividends, bonuses to shareholders who were owners of fishing-smacks and who employed the companies in supplying ice and carrying for them. The Defendant employed these companies in respect of the Plaintiffs' smacks, and received bonuses as if the smacks were his own.

The Plaintiff company brought an action against the Defendant for an

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account of commissions and bonuses received by him, and for damages for alleged breaches of duty: and the Defendant counter-claimed for wrongful dismissal and for the salary for the quarter which had expired before his dismissal:—

Held (reversing the decision of *Kekewich*, J.), that the receipt of a commission from the shipbuilding company was good ground for dismissal, although it was not discovered till after the dismissal had taken place; and although it happened several months previously, and might have been an isolated act:

That the Defendant must account to the Plaintiffs for the bonuses received from the ice and carrying companies, as they had been paid in respect of the Plaintiffs' smacks; although the Plaintiffs could not themselves have received the bonuses, not being shareholders of the companies:

That the contract between the Plaintiffs and the Defendant was contained in the agreement between the promoter and the Defendant as adopted by the company, and was not modified by the articles of association; that the salary was consequently payable yearly and not quarterly; and therefore that the Defendant having been dismissed for misconduct was not entitled to any part of the unpaid salary for the current year of his service.

If the Plaintiff company had not formally adopted the agreement by a separate instrument, *quære*, whether the articles might not have been taken as evidence that the parties had agreed to a modification of the agreement by making the payment of the salary quarterly.

THIS was an action brought by the *Boston Deep Sea Fishing and Ice Company, Limited*, and *J. C. Garfit*, against *A. W. Ansell* and *J. Hadfield* under the following circumstances:—

By an agreement dated the 4th of August, 1885, the Defendant *Ansell* agreed to sell to the Plaintiff *Garfit*, as trustee for the Plaintiff company, which was then in process of formation, seven fishing-smacks for £9000, which smacks were to be delivered in thorough sea-going repair and fully equipped for immediate use in the deep sea fishing and trawling business, and to pass the inspection of the purchaser's manager. *Ansell* was at his own expense to do such renewals and repairs as the surveyor should require, and should take 100 fully paid-up shares in the company, the balance of the purchase-money to be paid by instalments as therein mentioned. It was also agreed that, on the formation of the proposed company, *Ansell* engaged to become managing director thereof at a salary commencing on the 1st of September then next at the rate of £1 a week per smack until the 1st of January, 1886, when his salary should be after the rate of £800 a year. And *Ansell* agreed to reside at *Boston* or the neighbour-

hood, and to remain in the service of the proposed company for a term of not less than five years, subject as thereinafter mentioned. It was provided that *Ansell* should be at liberty to engage in any business and to be a member of any company which was not prejudicial to the intended company. And it was also agreed that *Ansell* should be allowed £5 per cent. on all fish supplied or sold by the company to its customers, exclusive of fish sent to inland markets on commission, and in addition to his salary. But if *Garfit* should not be able to fulfil the agreement by being unable to float the company, or to pay for the smacks, *Ansell* should be at liberty to terminate the agreement.

The company was incorporated under the *Companies Act*, 1862, on the 18th of August, 1885. By clause 60 of the articles of association the Defendant *Ansell* was named as one of the first directors of the company. By clause 68 it was provided that no director should be disqualified by his office from contracting with the company either as vendor, purchaser, or owner, nor should any such contract or arrangement, or any contract or arrangement entered into by or on behalf of the company with any company or partnership, of or in which any director should be a member or otherwise interested, be avoided, nor should any director so contracting, or being such member, or so interested, be liable to account to the company for any benefit realized by any such contract or arrangement, by reason only of such director holding that office, or of the fiduciary relation thereby established; but no such director should vote in respect of such contract or arrangement. Clause 73 gave power to the company to dismiss directors by extraordinary resolution except as thereinafter provided. By clause 75 it was provided that the Defendant *Ansell* should be the first managing director of the company, and should continue to hold such office for five years from the registration of the company, and should not during that period be removable from his office otherwise than by his own resignation, so long as he should while holding that office reside in or in the immediate neighbourhood of *Boston*, and should give such an amount of superintendence and attention to the business of the company as might be necessary for the efficient management thereof. Clause 76 provided that the salary of *Ansell* should be from the 1st of

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September, 1885, until the 1st of January, 1886, at the rate of £1 per week for each of the company's smacks, and from and after the 1st of January, 1886, at the rate of £800 per annum, payable quarterly, and that he should while holding such office be entitled to a commission of 5 per cent. on all sales of fish, ice, and game sold by the company to its private customers, exclusive of fish sent to inland market towns on commission. By clause 77 the directors might, subject to the two last preceding clauses, with the sanction of a general meeting, appoint and remove managing directors.

The first meeting of the board of directors was on the 27th of August, 1885, but the agreement with *Ansell* was not then entered on the minutes.

By an agreement dated the 8th of January, 1886, under the seal of the company, the agreement of the 4th of August, 1885, was adopted by the company as if the company had been in existence at the date thereof.

The Defendant *Hadfield* was nominated surveyor and inspector, and reported on the smacks, receiving for his fees £25 19*s.* 6*d.*

In the autumn of 1885 *Hadfield* gave certificates to the effect that the smacks had been surveyed and inspected by him, and were in sea-going order and good repair: and the company accordingly paid or secured to *Ansell* the balance of his purchase-money.

In the month of August, 1886, the directors of the Plaintiff company, being dissatisfied with *Ansell's* conduct, caused an investigation of his accounts and management to be made, and as the result of such investigation on the 13th of September they passed a resolution suspending him from the office of managing director.

On the 2nd of October an extraordinary meeting of the company was held, and a special resolution was passed altering the articles of association and dismissing *Ansell* from his office. This resolution was confirmed on the 19th of October. The principal charges made against *Ansell* were as follows:—

The company accused him of having acted dishonestly and in collusion with *Hadfield* in obtaining fraudulent certificates, and of repairing the smacks in an insufficient manner, and making improper charges for the repairs.

The Defendant was at the time of the formation of the company, and continued to be, a shareholder in the *Hull Ice Company*. This company, after declaring the ordinary dividend for its shareholders, was in the habit of dividing its surplus profits as a bonus among the shareholders whom it supplied with ice rateably to the quantity of ice supplied. The Defendant *Ansell* used to procure the ice for his smacks from the company; and after the sale of them to the Plaintiff company, he, on the Plaintiffs' behalf, continued to procure ice from the same company.

The Defendant received bonuses in his character of shareholder in respect of the ice supplied to the smacks since the sale to the Plaintiffs to the amount of about £60.

The Defendant *Ansell* was also a shareholder in the *Hull Steam Fishing and Ice Company* (called in the argument the *Red Cross Company*), whose surplus profits were divided on the same principle, and it was provided by the articles of that company that the shareholders who were owners of smacks should employ the company's ships as their carriers. The captains of the smacks belonging to the Plaintiff company used to employ the *Red Cross Company* to carry their fish from the fishing grounds to *London* and *Hull:* and the Defendant in his capacity of shareholder of the *Red Cross Company* received a considerable sum in bonuses from the last-named company in respect of these smacks.

The Defendant alleged that the directors of the Plaintiff company knew of his connection with these two companies and made no objection to his receiving the bonuses, which he claimed to retain as his right. It appeared that there had been some question between *Ansell* and the *Hull Ice Company* as to whether he was entitled to bonuses given in respect of the ice purchased from them, but *Ansell* had insisted upon receiving them. [And on the 27th of May, 1886, the secretary of the *Red Cross Company* had written a letter to the directors of the Plaintiff company saying that the bonuses could not be paid by the *Red Cross Company* to *Ansell* without the consent of the directors of the Plaintiff company. The directors do not appear to have taken any action on this letter, and *Ansell* replied to it by saying that he had the consent of the directors to his receiving them.

A charge was also made against *Ansell* that he had made an

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excessive charge against the underwriters in respect of a smack called the *Fishtoft*, and also that he had demanded excessive fees from the apprentices; but these charges were not substantiated.

A more important charge against *Ansell* was as follows:— Shortly after the incorporation of the company the directors authorized *Ansell* to contract with *Earle's Shipbuilding Company* to build certain smacks, and he accordingly entered into two contracts with the *Shipbuilding Company*. *Ansell* received a commission of £1 per cent., amounting to £169 on the first of these contracts, and a present of £50 in respect of the second, without the knowledge of the Plaintiff company. The directors did not discover the fact of his having received these sums till after his dismissal; nor, indeed, till after the action had been commenced.

The present action was brought by the company against *Ansell* and *Hadfield* claiming the commissions and other sums which *Ansell* had received in breach of his duty to the company and damages for the alleged misconduct of the Defendants.

The Defendant *Ansell* put in a counter-claim claiming damages for his unlawful dismissal and his salary up to the date of his dismissal.

The trial lasted several days and several witnesses were examined. The action came on for hearing before Mr. Justice *Kekewich* on the 12th of January, 1888.

Lawrance, Q.C., *Barber*, Q.C., and *Warrington*, appeared for the Plaintiffs.

Warmington, Q.C., *Crump*, Q.C., and *Vernon R. Smith*, for the Defendant *Ansell*.

T. Hall, for *Hadfield*.

1888. Feb. 1. KEKEWICH, J., after stating the history of the transactions, in the course of which he carefully examined the evidence as to certificates given by *Hadfield*, expressed his opinion that there was no evidence of any dishonest action on the part of *Ansell* and *Hadfield* concerning them, and that

Hadfield must be acquitted of all fraud and negligence in giving those certificates. He also held that *Ansell* did the repairs required by *Hadfield* to be done, and made no improper charges in respect of them.

With respect to the bonuses received by *Ansell* from the *Hull Ice Company* and the *Red Cross Company*, his Lordship said:—What I understand to be the general law on the subject is this, that an agent cannot profit by his employment—any profit made by an agent by reason of his employment belongs not to him, but to his principal. Now in these cases Mr. *Ansell* received profit, not, as I view it, in his character of agent of the company, but in another character, a character consistent with his employment, unless it was prohibited by the terms of his employment, which it was not. If that character ceased to exist as regards either company he may have improperly received the bonuses. But that question does not affect the Plaintiff company. They could not have received it in any event, and it is the essence of a title to relief of this kind that the principal should be able to claim as his, moneys that were received by the agent. It must be money had and received by the agent to the principal's use. I have preferred to put first the question of general law, but probably it might equally well be decided on the special agreement, that is to say, the agreement of the 4th of August, 1885, which must be regarded as the agreement between *Ansell* and the company, having been adopted afterwards by the company. That enables *Ansell* to carry on any trade not prejudicial to the interests of the company. It has not been suggested that what *Ansell* did in purchasing ice of the *Hull Ice Company* or sending fish to port by the *Red Cross Company* was in any way prejudicial to the interests of the company. If that had been so a further question might have been raised, under the special agreement or otherwise, but there is no evidence of that kind. On both of these grounds I think that he is entitled to retain that bonus.

Then there is the further question: Did *Ansell* receive money by way of commission from *Earle's Shipbuilding Company* in respect of trawlers built for the Plaintiff company? Here, again, there is no question about the fact that he did receive—rather coyly, according to his own account, in the first instance, not coyly

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in the second—something altogether like £219, more or less. *Earle's Shipbuilding Company* built two sets of trawlers for the *Boston Company*, and on each occasion he received a commission, or rather received payment which he said was not a commission.

Now the story is that *Earle's Company* required somebody to look after the building of these smacks, to see that they were according to specification, and built according to the requirements of the trade, or something of that kind, and that they asked *Ansell* to undertake it. I can well believe it was extremely important that somebody should watch the building of those smacks, to look at them from time to time to see that they were built not only according to contract, but in such a manner that they would be suitable for deep sea fishing. But the importance was not to *Earle's*, but to the *Boston Company*, whose managing director *Ansell* was. He was performing his duty to his own company in seeing that done. If it were necessary that somebody should do it, and he could not have spared the time, somebody else might have been appointed, but so long as he did it, he must have done it as the agent of the *Boston Company*. Then Mr. *Ansell* (I am bound to say not his counsel) puts the receipt of this commission on two grounds, which I do not think ought to be called ingenious; they are not worthy of the name. He says in the first place that he was at this time paid £1 per week per smack, and was not the salaried officer of the company. How he was paid seems to me not of the slightest importance. Then he says it was not the order of the company but his own. He knows perfectly well that the smacks were ordered for the company, built for the company, delivered to the company for the use of the company, but because the shipbuilding company in their prudence thought it desirable to have individual liability instead of that of an incorporated limited company, therefore Mr. *Ansell* wishes to ride off on that and says that they were not the smacks of the company. I extremely regret that the point was ever made, and I am bound to say that although I decide it as a matter of law, and I do not feel disposed to make any remarks on it beyond this, that the claiming it and insisting on claiming it, and the argumentative evidence given in support of it, went as far as anything to convince me that Mr. *Ansell's* moral character is not so high as

I have no doubt the directors thought it was when they engaged him as managing director.

[With respect to the alleged excessive claim against the underwriters of the *Fishtoft*, his Lordship held the charges entirely disproved, as also certain disputed charges in respect of apprentices. He was also of opinion that there was no ground for complaint against *Ansell* for want of supervision or attention to the business of the company.

With respect to the terms of the contract between *Ansell* and the company his Lordship held that they were to be found in the agreement of the 4th of August, 1885, and the agreement of the 8th of January, 1886, by which the former agreement was adopted by the company irrespective of the articles of association, and that by that contract the company had bound themthemselves to employ *Ansell* as managing director for the term of five years from the registration of the company at a salary of £800 a year. His Lordship then said:—]

There must be in such relation an implied contract on the part of the servant to do the work of his office honestly and with diligence, and there must be under such circumstances a right on the part of the employer to dismiss for fraud in connection with the office. I do not think it is necessary to go into the question whether they might dismiss him for immoral conduct or fraud outside the office; but, certainly, for anything connected with his employment such dismissal would not be a breach of the contract but in the exercise of their rights. If the fraud with *Hadfield* had been proved I should have had no hesitation in holding that as a good ground for dismissal. I think that probably some of the other cases alleged, if they had been proved, even though small in themselves, might by a cumulative process have been made sufficient ground for dismissal. That is what has been argued by the Plaintiffs, and I am not at all disposed to disagree with them, but no number of suspicions will make a fact, and I therefore hold the charges with one exception not to be proved. I do not think that the case is made out.

As regards the commission received from *Earle's Company*, that is said to be sufficient ground for dismissal. I can well understand its being held to be suspicious. I can well understand the

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company, or the directors on behalf of the company, taking high ground, and saying that they would have nothing more to do with the man; but, on the other hand, I observe that it is an isolated case, not necessarily bearing on the general conduct of the business of the company, and to some extent at least remediable by the recovery of the amount received by *Ansell*. I think that after the best consideration I can give to the point it would be going too far to say that the company were entitled to dismiss their five years' manager because they found out that in one transaction, divided, no doubt, into two parts, he had received a commission which was not his, and which must belong to the company.

I have come to the conclusion therefore that Mr. *Ansell* was not on the 2nd of October liable to be dismissed. But as I wish to decide all questions I must express my opinion on this last point which arises in the case. I put the agreement aside, and consider that everything depended on the special resolution, and I go back to the question how Mr. *Ansell* was dismissed. That he has been dismissed *de facto* is enough for the company, and I might leave it there, but I think I ought to dispose of this remaining point. The company could by special resolution have altered their articles of association. Did they do it? To my mind they did not proceed in the proper way to do it. According to the case of *Imperial Hydropathic Hotel Company, Blackpool* v. *Hampson* (1) it is at least questionable whether they could have altered their articles of association at all with reference to Mr. *Ansell's* removal; but I am quite satisfied that they had no right to remove him by the same resolution. I thought at first they had only proposed to remove him at the second meeting after they had passed and confirmed the resolution altering the articles of association, but on looking into it again I see that they actually passed the resolution removing him on the 2nd of October at the first meeting, when *non constat* that they ever could have the power, so that not only was the resolution passed by a meeting not properly convened for the purpose, but passed when, as a matter of time, the company had no power to pass it. Therefore I think Mr. *Ansell*, either on the ground of the construction of the contract, or on the ground of the way in which the legal

(1) 23 Ch. D. 1.

power of altering the articles has been exercised, is entitled to say he was improperly dismissed. That leaves me to consider the practical result, which I can do very shortly. Mr. *Ansell* was dismissed on the 2nd of October. It appears that he was paid a salary of £800 up to the 1st of July, and practically there was a quarter's salary due to him. He is entitled to this £200, without doubt. I think it ought to carry interest. That will be a small sum, and I throw it into the damages.

[His Lordship gave judgment in the action for the Defendant *Ansell* except as regarded the commission received from *Earle's Company*, and for the Plaintiffs as regarded that, in each case with costs, and dismissed the action against *Hadfield* with costs.

With regard to the counter-claim his Lordship gave *Ansell* his quarter's salary of £200 and a year's salary by way of damages, namely, £800, with the costs of the counter-claim. And he directed an account of commission on sales to which *Ansell* was entitled under the contract.]

From this judgment the Plaintiffs appealed. C. A.

The appeal came on for hearing on the 25th of June, 1888.

Lawrance, Q.C., and *Warrington* (*Barber*, Q.C., with them) for the Appellants:—

We do not rely on the charges against *Ansell* respecting *Hadfield's* certificates, or the insurance on the *Fishtoft*. But we contend that the company had good ground for dismissing him on account of the commission received by him from *Earle's Shipbuilding Company* and the bonuses received by him from the *Hull Ice Company* and the *Red Cross Company*.

With respect to his taking a commission from *Earle's Shipbuilding Company*, Mr. Justice *Kekewich* held that it was a breach of duty on *Ansell's* part, and that we are entitled to an account of it; but he considered that it was an isolated case, and that as it happened a long time ago it formed no sufficient ground for dismissal. There is no ground for such a conclusion. It is not clear that it was an isolated case, and if it was, the clear breach of duty is a good ground for dismissal of a servant. It is true that we did not know of it at the time of the dismissal, but it is

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well established that that fact makes no difference. Nor does the lapse of time since the act was committed make any difference. If we had known of it before we might have been held to have condoned it, but that was not the case here: *Pearce* v. *Foster* (1); *Ridgway* v. *Hungerford Market Company* (2).

Then as to the bonuses from the two companies; they were paid in respect of our ships, and therefore the money belonged to us, and it was a breach of duty on *Ansell's* part to take them. It is true that we could not have received the bonuses ourselves, because our company was not a shareholder in those two companies; but the fact remains that they were earned by our ships. The receipt of them by the Defendant therefore was a good cause of dismissal and we are entitled to an account of them. The counter-claim therefore ought to have been dismissed.

With respect to *Ansell's* claim for a quarter's salary payable on the 1st of October, we contend in the first place that his dismissal took place on the passing of the resolution of the 13th of September, when he was suspended: and that event having been in the middle of the quarter, no quarter's salary became due. But, secondly, it is not true that the salary was payable quarterly. The contract between the company and *Ansell* is to be found in the agreement of the 4th of August, 1885, and the 8th of January, 1886. The salary is there made a yearly salary, and there is no mention of its being payable quarterly. The clause in the articles of association which made the salary payable, was only binding between the company and the shareholders: it was no part of the contract with *Ansell*. If therefore his dismissal dates from the 2nd of October, he is not entitled to anything; his salary did not become due till the end of the year, and he has lost all claim to it by his breach of duty: *Goodman* v. *Pocock* (3).

Crump, Q.C., and *Vernon R. Smith*, for the Defendant *Ansell*:—

It may be that the Plaintiffs are entitled to an account of the commission received from *Earle's Shipbuilding Company*, but it was a small isolated matter, and was no ground for dismissal.

(1) 17 Q. B. D. 536. (2) 3 A. & E. 171.
(3) 15 Q. B. 576.

Every fault is not a ground for dismissal; that is a question for a jury. And if the act complained of has happened some time ago it must be supposed to have been condoned. The Plaintiffs never relied on this act as a ground of dismissal, it was a mere after-thought. They rested the dismissal, both at the time and in the action, on the transaction with *Hadfield* and the insurance on the *Fishtoft*, which have been entirely disproved.

The bonuses from the *Ice Company* and the *Red Cross Company* fairly belonged to *Ansell*. They could not have been received by the company, because it was not a shareholder; therefore he did not defraud the company of them. By *Ansell's* contract with the company, and by clause 68 of the articles of association, *Ansell* was at liberty to earn dividends in other companies. There was no concealment in the matter; the letter which the *Red Cross Company* wrote to the Plaintiffs on the subject and *Ansell's* reply were entered in the letter-book, and were known to the directors. Nor is it correct to say that *Ansell* was acting as agent for the Plaintiffs in this matter. He bought the ice from the *Ice Company* and resold it to the Plaintiffs, which he was entitled to do under the articles. And as to the *Red Cross Company*, the captains of the smacks were the persons who really employed the company's carriers to take home their fish. If *Ansell* acted wrongly in this matter it was no ground for dismissal: *Bentley* v. *Craven* (1).

With respect to *Ansell's* counter-claim, the dismissal, if justified, did not take place till the 2nd of October, after the quarter's salary was due; the payments were always made quarterly, and that is sufficient to shew that the salary was intended by the contract to be so paid: *Taylor* v. *Laird* (2). At all events he is entitled to the commission on sales which were effected before his dismissal.

Lawrance, in reply.

COTTON, L.J.:—

This is an appeal by the Plaintiffs in the action not only on the ground that Mr. Justice *Kekewich* did not give them the full relief to which they are entitled on their statement of claim in

(1) 18 Beav. 75. (2) 1 H. & N. 266.

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this action, but also on the ground that he granted relief on the counter-claim to the Defendant *Ansell*, which he was not entitled to. It is necessary to state some of the facts very shortly.

[After stating the facts his Lordship continued :—]

At the time when the company dismissed Mr. *Ansell* they did not know what had been done by him as regards the contract with *Earle's Shipbuilding Company*, and it was not, I think, at all disputed that if there was any circumstance, though unknown to the company at the time when they dismissed Mr. *Ansell* from his position, which would justify them in so acting, it was immaterial whether that was known at the time, and if it was known and established after the time the action was brought, then they could justify the dismissal by proof of that fact.

Mr. *Ansell* was dismissed, and I think his dismissal from the position which he held must be taken to date from the meeting on the 2nd of October, and not from the day in September when he was suspended by the board, because suspension is very different from dismissal. When a man is suspended from the office he holds it is merely a direction, that so long as he holds the office and until he is legally dismissed he must not do anything in the discharge of the duties of the office, and I cannot consider that the resolution by the general meeting to discharge him from his employment, from the position he held, can be taken to relate back. Then the Plaintiff company by Mr. *Garfit* brought the action which, as against Mr. *Hadfield*, was dismissed, because the matters charged to have been done by him in collusion with Mr. *Ansell* were, in the opinion of the Judge, not proved, and we have not had any appeal from that dismissal. But Mr. *Ansell* brought a counter-claim in which he alleged that he had been wrongfully dismissed, and he claimed damages for that wrongful dismissal, and he also claimed £200 for the quarter's salary down to the 1st of October, and those the learned Judge granted him. Besides that he sought an account of commission which was due to him, or which was said by him to be due to him, for sales effected by the company, and, in my opinion, he is entitled to that under his agreement with the company, because he is entitled to all commissions on all sales previous to the time when he was dismissed.

I think, in the first instance, it is desirable, although it is not the principal contention here, to go to the relief which is sought by the Plaintiffs in their appeal. There is no appeal by the Defendant as regards the sum of £219 which was received by him from *Earle's Shipbuilding Company*. Mr. Justice *Kekewich* considered that the Plaintiffs were entitled to recover that sum from the Defendant, he having actually received that sum from *Earle's Shipbuilding Company*, part of it as a commission of 1 per cent. on the contract price for the first sale of vessels, and £50 as a sum paid, a lump sum, in respect of the subsequent contract which was entered into through Mr. *Ansell*. Therefore, one need not enter into it except so far as that transaction has to be considered for the purpose of determining whether there was a wrongful dismissal. That sum, I think, was received in May, 1886, and in respect of that sum we shall have to alter very considerably the order which was made by the learned Judge. There must be a direction that that shall be paid, and in my opinion the company are entitled to have interest at 5 per cent. as against their late manager since the time when that sum was received, which the judgment did not give them.

But there are two other matters in respect of which the Plaintiffs say they ought to have obtained relief from the Judge. Mr. *Ansell* had been engaged at *Hull* in the business of fishing, he had various smacks, and he was a partner or member of two incorporated companies, one called, for the sake of distinction, the *Ice Company*, the other called, for the sake of distinction, the *Red Cross Company*, which was a carrying company. As regards what he got from both those companies, the Plaintiffs seek relief. The way in which those companies provided for the division of their profits was very much the same in one respect, that is to say, they provided for this, that their members should have a division not exceeding a certain percentage by way of dividend, and that the bonus was to be given them as consuming members; that is to say, as regards the *Ice Company*, the shareholders in that company who bought the ice supplied by the company were entitled to a bonus in respect of the profits gained by the company on the transactions in which they were engaged with the company by buying ice from them. Now before the sale to the

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Plaintiff company, Mr. *Ansell* had a fleet of smacks, and he had purchased the ice, which those smacks required to keep their fish until they could get it to the market, from the *Ice Company*, and he received from the *Ice Company* in respect of that transaction a certain bonus. After the Plaintiff company had been formed, and after he had transferred his fleet of smacks to the company, he still continued to take from the *Ice Company* the ice required for the purposes of those smacks. It was contended at one time by Mr. *Vernon Smith* that he really bought from the *Ice Company* and then sold again to the Plaintiff company, but, in my opinion, the invoices which were put in evidence disprove that. They were invoices of ice as supplied not to him to be sold again to somebody else, but to be supplied to and on account of the very smacks which he had formerly owned, and which he had sold to the Plaintiff company. In paragraph 24 of his statement of defence, he says that he "has been for some years past, and is, a shareholder in the *Hull Ice Company, Limited*, which after payment of a certain dividend divides its surplus profits as a bonus among the shareholders whom it has supplied with ice rateably to the amount of ice supplied to them, and before the sale of the said smacks to the Plaintiff company he procured his ice for such smacks from the said *Ice Company*. Since such sale he has on the Plaintiffs' behalf procured such ice from the said *Ice Company*, and supplied it to the Plaintiffs at the price charged to all customers." There he says and admits that he procured it on behalf of the Plaintiff company. Then he says, "To save payment of the bonus the *Ice Company* proposed to debit the Plaintiff company, and not this Defendant, with the ice supplied, but this Defendant refused to allow this to be done. The surplus profits payable to this Defendant as such shareholder in respect of ice supplied to the Plaintiff company amount to £60 or thereabouts." Now Mr. Justice *Kekewich* considered that the Plaintiff company were not entitled to that £60, which *Ansell* received by way of bonus in respect of the ice supplied, since the vessels were no longer his but the vessels of the Plaintiff company, and he does so on this ground, as I understand it, that the Plaintiff company could never themselves have been entitled to receive the bonus profit, and, therefore, they cannot claim it from the Defendant, who was

their agent, although he held him accountable for the sum which he received when he was their agent from the *Earle's Shipbuilding Company*. In my opinion that is not correct. The question is not whether the company could directly have claimed this sum, but whether, when their agent has received this profit in respect of a contract which he had entered into on behalf of the company as their agent for goods supplied to the company, the company are not entitled as against their agent to claim that money. In my opinion they are. It is a profit arising from a contract which he, on the part of the company, entered into in consequence of the supply to the company by his order of a particular quantity of ice. It was said that he was entitled under the articles to enter into contracts and business with the company. He was so, but that, in my opinion, did not justify him, when contracting on behalf of the company, to put into his own pocket a profit obtained simply and entirely in consequence of the goods being supplied under that order to the Plaintiff company. In that, therefore, I must differ from the view taken by Mr. Justice *Kekewich*. In my opinion, the Plaintiffs are entitled to that which they ask, and if they are not satisfied with the statement of the amount, an account as to the sums so received by him as bonuses from the *Ice Company*.

Then we come to another company, which was the carrying company. That was a company which had steam-vessels which went out from time to time to the fleet of fishing-smacks and brought home to the port the fish which had been caught by the vessels of the fleet. The contention raised by Mr. *Smith* was that there was no contract entered into by Mr. *Ansell* in respect of the carrying of fish home by the company, but that the contract was made by the captains of the smacks. In my opinion that can make no difference, because even if there was no direct contract by *Ansell*, and no direct order given by him to the captains of the smacks, yet having regard to the articles of association of the carrying company, and to what had gone on before the sale of the smacks to the company, and was apparently continued, we must hold judicially that the transfer of the fish caught by the smacks which were once his, but which at the time when the fish was caught were the smacks of the company, was done, if not by his

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special directions after the company was formed, at all events in continuance of the direction given by him before and under that contract which he had entered into with the carrying company. In the carrying company's articles there is an article which throws on every one of the smack-owners who is a member of the company the obligation and duty as between him and the carrying company, of sending all his fish home by their vessels, because we find this in the 14th article: "Every member being a smack-owner shall by all possible ways and means support and maintain the company, and all the members shall and will form their respective fishing-vessels so entered in the company into a fleet, and each member undertakes that all the fish caught by his respective entered vessels shall be carried to shore in the company's vessels, and in no other manner." So that there was a direct contract still existing between him and the company as regards his smacks, "and for the due and faithful observance of this and the last preceding article each member undertakes to enter into a bond with the company in the penal sum of £100." And then there was an article which gave these bonus profits only to those members who performed their obligations to the company. At this time it is true that *Ansell* was not a smack-owner in reality, because the owners of the smacks were the Plaintiff company and not *Ansell*, but he was acting as owner, and it was only as being owner, and representing himself to the carrying company as being the owner, that he was entitled to these bonuses in respect of the carriage of the fish. In my opinion, we should allow ourselves to be deceived by words, and should not be guided by facts, if we were to believe that the captains joined what fleet they pleased and then shipped on board whatever carrying vessels they thought fit. In my opinion, therefore, so far as any of the bonus profit which he has received from the carrying company is attributable to the fish caught in the smacks of the company, formerly his, and still worked in his name, he must account to the Plaintiffs on the same grounds as those which I have dealt with in the matter of the *Ice Company*.

Now we come to the counter-claim, and there is an appeal against the allowance of the counter-claim. What we have to consider first is this, had the company—although they knew it

not at the time when they dismissed the Defendant in October—a good ground of dismissal? In my opinion, they had. I have stated that he was engaged not only by the Plaintiff Mr. *Garfit*, but that he agreed with the company to be their general manager, and had authority given to him with reference to the contract to be entered into with the *Earle's Shipbuilding Company*. Then when he was engaged in that contract, in respect of the matters of that very contract, he in one instance got a percentage of 1 per cent. from the *Shipbuilding Company*, and, in the other case, he insisted on getting—that is the evidence—and did get, a lump sum of £50. It is suggested that we should be laying down new rules of morality and equity if we were to so hold. In my opinion if people have got an idea that such transactions can be properly entered into by an agent, the sooner they are disabused of that idea the better. If a servant, or a managing director, or any person who is authorized to act, and is acting, for another in the matter of any contract, receives, as regards the contract, any sum, whether by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. It is not an honest act, and, in my opinion, it is a sufficient act to shew that he cannot be trusted to perform the duties which he has undertaken as servant or agent. He puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer. He has a temptation, especially where he is getting a percentage on expenditure, not to cut down the expenditure, but to let it be increased, so that his percentage may be larger. I do not, however, rely on that, but what I say is this, that where an agent entering into a contract on behalf of his principal, and without the knowledge or assent of that principal, receives money from the person with whom he is dealing, he is doing a wrongful act, he is misconducting himself as regards his agency, and, in my opinion, that gives to his employer, whether a company or an individual, and whether the agent be a servant, or a managing director, power and authority to dismiss him from his employment as a person who by that act is shewn to be incompetent of faithfully discharging his duty to his principal. It was said by Mr. Justice *Kekewich* that this was an isolated transaction, and,

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therefore, in his opinion, it did not give legal authority or power to the company to dismiss him. But I cannot accede to that view. As far as we know it may have been an isolated transaction, but if we find at the very beginning of the employment that this agent, whose duty it was not to receive anything from the persons with whom he was dealing, did in fact do so, and in fact kept the receipt secret for months after the money was received, I am not satisfied that he did not do other things equally inconsistent with his duty to his principals; and in my opinion the discovery of that fact—even if it was an isolated transaction, shewing that he would put himself in a position not faithfully to discharge his duty, that he would put himself in a position to regard the interest of someone else rather than that of his employer—did justify his employers in discharging him from the office which he held. It was urged before us that it was a long time ago, and it was said, suppose this happened eight years ago; supposing the act had been done eight years ago, would that in law have justified the employer in discharging him? In law, I say yes. It is very true that if an employer was a reasonable man, and found that a servant who had served him faithfully for eight years, had, in the early time of his employment, done an act which was wrongful and which justified his dismissal, probably he might have said: "This is a man who has been in my employ for years, and he has always behaved himself honestly in the discharge of his duties, except in regard to this one transaction which took place such a long time ago, and, therefore I do not insist on my legal right." But, although a man would ordinarily act in that way, yet, in my opinion, that has no effect on the question whether the act is not of such a character as to justify the employer in dismissing him when he finds it out. Of course if he knows of the act and still continues to employ him, it might have been held by Judges of fact or by a jury that he had condoned it and prevented himself from insisting on the legal right. But assuming that the act of misconduct was unknown, it cannot be said that the mere fact that it happened eighteen months before, prevents the company from insisting upon their legal right to discharge a person who has so misconducted himself. In my opinion, therefore, so much of the order

as gives to Mr. *Ansell* on the counter-claim damages for wrongful dismissal must be discharged.

Then we come to another question, which is of a somewhat different character. The Defendant claimed £200 for a quarter's salary down to the 1st of October, and that was a question which gave considerable difficulty, and upon which we had considerable discussion as to the law bearing upon the matter. At first I understood that the contract between the company and Mr. *Ansell* was only a recognition, verbal or by resolution, of the agreement which was entered into early in August, before the incorporation of the company, with *Garfit*, acting on behalf of the company; but it appears that that is not the case. On the 8th of January, 1886, long after the company was formed, there had been another agreement in writing entered into between Mr. *Ansell* and the company, which provided that the former agreement should be adopted by the company, and be binding on the company in the same manner, and be read and construed in all respects as if the company had been in existence at the date thereof. That being so, we must read the agreement of August, 1885, just as if it was an agreement by the company, and not merely an agreement to be performed after it was adopted by the company. It was said that Mr. *Ansell* had a right of action for the quarter's salary due on the 1st of October, and therefore a right of action before his dismissal, and that therefore he has not lost that right of action by the dismissal. That was founded upon this, that, as a matter of fact, his salary, and the salary of other officials of the company, was paid quarterly, that being in accordance with the articles, which provided that the salary should be paid quarterly. But that article was not the contract between Mr. *Ansell* and the company, under which he agreed to serve the company, but it was a mere contract between the shareholders and the company, and regulated the way in which the payment should be made, and the way in which the accounts should be kept. What we have to consider is not whether, as a shareholder, he could have insisted on their performing that agreement, but whether, under the contract by which he agreed to be managing director of the company, he had that right, and then we must look to the terms of the agreement, which was confirmed in the manner I have

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mentioned. The agreement says that he is to have a salary after the 1st of January, 1886, at the rate of £800 a year. Now that to my mind is a contract for a yearly service and a yearly payment, and although as a matter of fact he was paid quarterly, it was not a payment under this contract, but a payment simply in accordance with the directions given by the company's articles, and not a payment under this contract. Therefore, in my opinion, it cannot be said that on the 1st of October there was a right in Mr. *Ansell* to sue the company under this contract of service with the company for £200, and the question does not arise as to what would have been the effect if that had been the case. Nothing which I say must be considered as expressing any opinion in favour of the view that if there had been a quarter's salary then actually due for which he could have sued, his dismissal would have deprived him of that right. But the question is this: Can he sue for a proportionate part of the salary for the current year? What he would have been entitled to if he continued in their service until the end of the year would have been £800, but in my opinion that would give him no right of action until the year was completed, and therefore the question which has been discussed before us does not really arise. If that is the true construction of his contract with the company as managing director, by which he agreed to come into the employ of the company, the authorities which were referred to, and which were not disputed, would shew that, as regards the completed quarter of the current year, he cannot, having been properly dismissed, get any payment in respect of that. In my opinion, therefore, on that point also the judgment must be varied.

Then we come to another point, which is this. Under the contract which was to bind the company and the managing director, he was also to be allowed 5 per cent. on all fish and ice supplied or sold by the company to its customers, exclusive of fish sent into the markets. That stands in a very different position from the salary of £800 a year. He had a right, in my opinion, to that percentage directly the sales had taken place. Probably as a matter of account, and as a matter of convenience, it would be calculated at the end of the year, and then paid to him; but I think he would be entitled to have the payment of

that percentage if he chose to sue for it whenever the sales took place. In my opinion the proper judgment will be to dismiss the counter-claim with costs, except so far as it seeks an account and relief in respect of the commission on the sales of ice and fish; the costs of that portion of the counter-claim must be reserved, as well as the costs of the inquiry, to be dealt with when the inquiry has been completed.

Then we come to what ought to be done as regards the costs of the action. Upon the substantial point raised between the Plaintiffs and Defendant, the Plaintiffs have succeeded. The real conflict undoubtedly has been upon the ground of the dismissal of Mr. *Ansell*—as to whether he was properly dismissed. But there were in the statement of claim charges made against Mr. *Ansell*, the Defendant, which were not in the opinion of the Judge established, and he dismissed with costs the Defendant, Mr. *Hadfield*, who was implicated, in the view of the Plaintiffs, in some of those transactions, the costs to be paid by the Plaintiffs. There is no appeal in respect of those matters. In my opinion the Plaintiffs ought to have the general costs of the action; but I think that, as regards the costs relating to the charges as to which they failed, the Plaintiffs ought not to have those costs. But it is a very different question whether any costs should be given to the Defendant *Ansell* in respect of those matters. The Defendant had misconducted himself, and I am of opinion that he was rightfully dismissed, and even the Judge thought there were grievous suspicions raised by his conduct, and therefore the proper order as regards that matter I think will be this, that the company are to have the general costs of the action, except such costs as refer to the matters mentioned in paragraph 19. As regards the costs of those matters, neither the Plaintiffs nor the Defendant are to have any costs.

BOWEN, L.J.:—

The Lord Justice has discussed at length the facts of this case, and in the judgment which I am about to pronounce I shall not travel through them again, but shall confine myself to stating shortly what seems to me to be the true view of the law of this case. I should not add a word to the judgment to which we have

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listened were it not that we are differing from the judgment of the Court below.

I will, first of all, deal with what is the cardinal matter of the whole case; whether the Plaintiffs were justified or not in dismissing their managing director as they did. This is an age, I may say, when a large portion of the commercial world makes its livelihood by earning, and by earning honestly, agency commission on sales or other transactions, but it is also a time when a large portion of those who move within the ambit of the commercial world, earn, I am afraid, commission dishonestly by taking commissions not merely from their masters, but from the other parties with whom their master is negotiating, and with whom they are dealing on behalf of their master, and taking such commissions without the knowledge of their master or principal. There never, therefore, was a time in the history of our law when it was more essential that Courts of Justice should draw with precision and firmness the line of demarcation which prevails between commissions which may be honestly received and kept, and commissions taken behind the master's back, and in fraud of the master.

In the present instance we have first of all to consider what was done by the managing director, and, in the next place, if we find that the managing director has taken and received a commission behind the back of his company and without the knowledge of his company, and kept it, we have to pronounce our opinion upon the question of whether or not in law that is an ample reason for his dismissal.

Now with regard to the facts relating to *Earle's Shipbuilding Company*, they stand beyond all dispute. The managing director has received a profit, and he has received a profit which was unknown to his own employers. How does that bear upon the condition which is implied in every contract of service or agency such as his—the condition that he will faithfully and truly discharge his duty towards his employer, and that if he does not so discharge it, the employer is to be at liberty to elect whether he will determine the service, or in spite of the fault continue the erring servant in his employ? Mr. Justice *Kekewich* recognising, as it seems to me, the law generally as I have stated it, appears

to have considered that the *Shipbuilding Company's* case was an isolated case, and on that ground thought he was entitled to say that, on the whole, there was no sufficient reason for dismissing him. I think the view that if it is an isolated case it does not amount to such misconduct as would entitle the master to determine the service, is a mistake. It seems to me to be a confusion between the duty of the Judge to draw inferences of fact, and the duty of the Judge to pronounce a decision of law. There may be cases where the breach of confidence and good faith towards the master would not arise from a simple isolated act, but would be founded on the accumulation and repetition of such acts, but those classes of cases are not cases of fraud at all, they are cases of isolated acts which, if they occurred singly, would not, in themselves, amount to a violation of the confidential relation or breach of the faithful service which the servant is bound to render. In that class of cases it is perfectly proper to consider whether on the whole the conduct of the servant has been such as to amount to a breach of confidence, and if it has not, then the master will not be justified in the dismissal. In such cases you might leave to the jury to consider whether there had been such an accumulation, or such a repetition of the acts, as to give a ground for the determination of service; but in cases where the character of the isolated act is such as of itself to be beyond all dispute a violation of the confidential relation, and a breach of faith towards the master, the rights of the master do not depend on the caprice of the jury, or of the tribunal which tries the question. Once the tribunal has found the fact —has found that there is a fraud and breach of faith—then the rights of the master to determine the contract follow as matter of law.

Now, there can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party,

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or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it. It is said if the transaction be one of very old date, that in some way deprives the master of his right to treat it as a breach of faith. As the Lord Justice has pointed out, the age of the fraud may be a reason in the master's mind for not acting on his rights; but it is impossible to say that because a fraud has been concealed for six years, therefore the master has not a right when he discovers it to act upon his discovery, and to put an end to the relation of employer and employed with which such fraud was inconsistent. I, therefore, find it impossible to adopt Mr. Justice *Kekewich's* view, or to come to any other conclusion except that the managing director having been guilty of a fraud on his employers was rightly dismissed by them, and dismissed by them rightly even though they did not discover the fraud until after they had actually pronounced the sentence of dismissal.

Then what follows from that with regard to the salary? As regards his current salary, it is clear and established beyond all doubt by authorities which we should not be justified in overruling, even if we desired to do so, that the servant who is dismissed for wrongful behaviour cannot recover his current salary, that is to say, he cannot recover salary which is not due and payable at the time of his dismissal, but which is only to accrue due and become payable at some later date, and on the condition that he had fulfilled his duty as a faithful servant down to that later date. The authorities put the question beyond dispute, and principle also leads us to the same conclusion. He cannot sue in such a case on the original contract with the master, because the contract which his master has made is that he shall pay the salary only at the end of the current period which has not yet expired, and the servant by his wrongful conduct has prevented himself from suing for that salary by non-performance of the condition precedent under the contract. He cannot recover therefore on the special contract, nor can he recover on a *quantum meruit*, because he cannot take advantage of his own

wrongful act to insist that the contract is rescinded. As regards himself the contract is still open, although he has chosen to break it. Some confusion always arises, as it seems to me, from treating these cases between master and servant as instances of a rescission of the original contract. It is not a rescission of the contract in the sense in which the term ordinarily is used, viz., that you relegate the parties to the original position they were in before the contract was made. That cannot be, because half the contract has been performed. It really is only a rescission in this sense, that an act occurs which determines the relation of master and servant for the future, and you may regard that determination in two ways; it is either a determination in conformity with the rights of the master which arise under the contract itself, there being, as I have said, in every contract of service an implied condition that if faithful service is not rendered the master may elect to determine the contract, and the determination takes place on that implied condition; or you may regard it under the more general law, which is not applicable to contracts of service alone—you may treat it as the wrongful repudiation of the contract by one party, being accepted by the other, and operating as a determination of the contract from that time, that is, from the time the party who is sinned against elects to treat the wrongful act of the other as a breach of the contract, which election on his part emancipates the injured party from continuing it further. It is not a rescission of the contract in the ordinary sense in which the term is used in common law. It is for that reason that it becomes plain beyond all doubt, as it seems to me, that the servant cannot sue on a *quantum meruit* any more than he can sue under a special contract. The only question, therefore, is whether the salary in question was current salary within the meaning of the propositions which we have been discussing—was it money any portion of which had accrued due at the time of the dismissal, even though it had not been payable till afterwards? or was it a salary which had not accrued due at all? If it had accrued due, even although not payable till afterwards, it may be that a question would have arisen. On that question I desire to express no opinion, as it does not necessarily arise in this case.

It seems to me that on the true view of the facts no portion of

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the salary in this case had accrued due before the dismissal of the managing director. According to the original contract which was to be adopted by the company, he was to be paid at an annual rate. The company was formed, and amongst its articles of association it provides that the managing director is to be paid quarterly, and inasmuch as the contract is one which was not necessarily within the *Statute of Frauds*, and might be made by parol only if the matter had stood there, I think the existence of the articles of association at the time when the managing director entered on his employment, and the fact that in the articles of association, which must have been known to all parties, there was contained a provision that the managing director was to be paid quarterly, might be some evidence for the jury or for the Court from which they might reasonably conclude (if the matter stood there) that in reality, although the original written contract contained no such express provision as to quarterly payment, nevertheless the true terms on which he was serving were that he should be paid quarterly. But the case, unfortunately for the managing director, does not stand there, because after the articles of association had been framed, and after he had entered nominally on his duties, it was agreed between him and his masters—the company—that he and they should again reduce into writing the exact terms on which he was to serve, and in reducing the terms into writing again they omit, and he omits, any provision for quarterly payment. It seems to me, therefore, that really one must look, and look only, to the agreement, which by arrangement between the parties themselves was to be taken as the final and express agreement between them, and the inference in favour of the salary being payable quarterly, which otherwise would have arisen, is displaced by the subsequent agreement. The matter is not perhaps beyond all doubt, but that, I think, is the true view of that article.

As to the sales, it seems to me, for the reasons which have been given by the Lord Justice, his dismissal does not prevent him from being entitled to any commissions on sales which had become due at the time of his dismissal, because although in the ordinary course of the business of the company the commission on such sales would not be ascertained until the end of the current year,

the end of the current year has now expired, and I think on his dismissal they would become payable at once. I think he is entitled at his own risk, and subject to the reservation which the Lord Justice has suggested as to costs, to an account of the commission due on such sales, if any such sales there be, as to which I know nothing.

That really disposes of the most important part of the dispute between the parties. But I also wish to add one word on the subject of the bonuses which he claims to be entitled to retain as received from the *Hull Ice Company* and the *Hull Fishing Company*, otherwise called the *Red Cross Company*. If that was a profit received by him, as it seems to me to have been, while he was agent, and arising out of the duty which he was employed to do for the company, it falls under the same branch of law as the profits received in respect of the *Shipbuilding Company*. I have some little difficulty in following Mr. Justice *Kekewich's* judgment with regard to that. We may perhaps have an inaccurate note of it, but if Mr. Justice *Kekewich* is of opinion that it is the essence of a title to relief in such a case that the principal would have been able to claim as his own money, as between himself and the other party to the business transaction, the money secretly received by his agent, I do not think that is the law. It is true, as Mr. Justice *Kekewich* says, that the money which is sought to be recovered must be money had and received by the agent for the principal's use; but the use which arises in such a case, and the reception to the use of the principal which arises in such a case, does not depend on any privity between the principal and the opposite party with whom the agent is employed to conduct business—it is not that the money ought to have gone into the principal's hands in the first instance; the use arises from the relation between the principal and the agent himself. It is because it is contrary to equity that the agent or the servant should retain money so received without the knowledge of his master. Then the law implies a use, that is to say, there is an implied contract, if you put it as a legal proposition—there is an equitable right, if you treat it as a matter of equity—as between the principal and agent that the agent should pay it over, which renders the agent liable to be

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sued for money had and received, and there is an equitable right in the master to receive it, and to take it out of the hands of the agent, which gives the principal a right to relief in equity.

For these reasons I fail to agree with the judgment of the learned Judge in the Court below, and I think the judgment suggested by the Lord Justice is the only possible one.

FRY, L.J.:—

I also feel myself quite unable to agree with the decision of the learned Judge in the Court below, and as I differ from him, I propose to add a few words to explain the grounds of my decision.

The main question of law to be determined in this case is, what was the real legal character of the dealings between the Defendant *Ansell* and *Earle's Shipbuilding Company?* With regard to the facts of that case there is really no dispute. Mr. *Ansell* was appointed managing director of this company by an agreement entered into before the company was registered, adopted by the company after its registration, and not merely was he so appointed from its commencement but at the first meeting of the directors on the 27th of August he received express instructions to arrange the terms of the building of four or five trawlers, which might be required, with Messrs. *Earle.* Thus authorized, both as managing director and by the special resolution of the board, he goes to Messrs. *Earle,* and he accepts an agreement from them to pay him a commission of 1 per cent. on the price to be paid by the company, of which he was managing director, to Messrs. *Earle.* A further contract was subsequently entered into in which it is said that Mr. *Ansell* exerted himself to beat down the prices of Messrs. *Earle,* but he higgles and insists on a payment being then made to him, and after debate succeeds in obtaining £50 from them. Those are the broad and undisputed features of Mr. *Ansell's* dealing with Messrs. *Earle.* In my judgment, the conduct of *Ansell* in so dealing was a fraud—a fraud on his principals—a fraud, not according to any artificial or technical rules, but according to the simple dictates of conscience, and according to the broad principles of morality and law, and I think it is the duty of

the Courts to uphold those broad principles in all cases of this description.

We were invited to consider the state of mind of Mr. *Ansell*; whether he thought it wrong; in other words we are invited to take as the standard for our decision the alleged conscience of a fraudulent servant. I decline to accept any such rule as one on which the Court is to decide such questions.

Now, having come without hesitation to the conclusion that Mr. *Ansell's* conduct was fraudulent, the results appear to me to be very plain. In the first place, it gives the company a right to recover, with interest at 5 per cent., the money which Mr. *Ansell* received, and received, according to my view, in consequence of his position, for the use of the company, and without disclosing to the company the fact of the receipt. I take that to be the undoubted right of a principal who has been defrauded by his agent. In the second place it appears to me to deprive *Ansell* of any right to recover the £200 which, according to the ordinary course of business between them, would have been payable to him as salary. That of course depends, not only on the question which I have already dealt with, but on the further inquiry whether the engagement to pay is to pay annually or quarterly. Now, like my learned Brother who preceded me, if the matter rested really on the contract of the 4th of August and the articles of association, which authorize the directors to confirm and carry into effect the agreement of the 4th of August with modifications, I should have been inclined to hold that there was evidence on which we might reasonably conclude that the directors had modified the original contract between *Ansell* and the company, and that it had been adopted with the modification that the salary should be paid quarterly. But then we find, that months after those articles have been executed and the company registered, a formal instrument is entered into between *Ansell* and the company, by which it is agreed that the original terms of the agreement of the 4th of August shall be the terms binding between the company and him. The terms of the 4th of August were yearly employment and a yearly payment. Therefore, notwithstanding the practice of the company, which seems to me to be referable to the articles

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and to justify the quarterly payments as between the directors and the shareholders, yet the relations between *Ansell* and the company are regulated by the agreement of the 8th of January, and those were for a yearly payment. I think, therefore, that the £200, which in the ordinary course would have been paid on the 1st of October, were really a portion of the current salary, and as such cannot be recovered by a servant who has been dismissed for fraud.

The other conclusion at which I arrive is this; that the fraudulent conduct of *Ansell* was in law ample justification for his dismissal; in other words, that when the master discovered the fraudulent conduct on the part of the servant, that gave him a plain right to dismiss that servant. I do not think that that proposition can for a moment be disputed.

Numerous arguments were addressed to us to induce us to come to the conclusion that this conduct of *Ansell's* was not truly of the character that I have described. [His Lordship then referred to some arguments based upon the view of the facts taken by Mr. *Ansell*, and which his Lordship held to be untenable, and continued:—] Again, Mr. *Ansell* has relied on the stipulation contained in the contract between himself and Mr. *Garfit* that he might be allowed to carry on any business of a nature not prejudicial to the interests of the company. But it is prejudicial to the interests of the company when a man whose duty it is to buy at the lowest price enters into a bargain which makes it his interest to buy at the highest. In fact, all these points put forward are mere dust thrown in the eyes of the Court to endeavour to shut out the true nature of this transaction, which, I repeat, to my mind, and according to my view, is a grave and undoubted fraud.

But then it is said, and that is the view which weighed with the learned Judge, that this is an isolated case. We have no other ground upon which we can conclude this to be an isolated case except the absence of success on the part of the Plaintiffs in proving any other case except that to which I shall shortly refer, and the oath of Mr. *Ansell* that it is such. I do not feel judicially satisfied that it is an isolated case. Suppose it be, is that an excuse? Is a man to commit a gross fraud on his

master, to conceal that fraud, and then, when it is discovered, say, "Oh, this is an isolated case, and, therefore, you cannot dismiss me?" That is not, according to my view, the law of the land with regard to the relation of master and servant. I repeat, it seems to me the company were justified in law, as well as in morality, in discharging Mr. *Ansell* as a man who was not worthy of being trusted by them.

The only other questions to which I need refer are, shortly, with regard to two contracts between the *Ice Company* and the *Red Cross Company* and Mr. *Ansell*. With regard to those, the only point I think it at all necessary to refer to is the ingenious argument of Mr. *Vernon Smith* that with regard to the *Red Cross Company* there was no evidence of the contract made by Mr. *Ansell*. According to my view it is not necessary that there should be evidence of a contract by Mr. *Ansell*. He undertook, with the *Red Cross Company*, to use all his influence to promote their interests by entering as many smacks as might be upon the books of the company, and trading with them to as large an extent as he could. He was entitled to the bonus only on the terms of observing that obligation, and he received the bonus. By his act, therefore—and he has told us, no doubt, the truth—he did influence business to that company. Whether he influenced it by giving directions to the smack masters, or in however indirect a way, is immaterial. He has taken money upon the footing of bringing business to them, and after that it is impossible for us to say that he did not bring it.

With regard to the other points which have been dealt with by the Lords Justices, I content myself by saying that I concur entirely in everything that they have said.

COTTON, L.J.:—

The order will be as follows:—

Discharge the order of Mr. Justice *Kekewich* except so far as it dismisses the action as against *Hadfield*, with costs to be paid by the Plaintiffs, and except so far as it directs an inquiry on the counter-claim as to the commissions on orders and sales of fish and ice, and reserves the costs of the inquiry. An inquiry as to the time when the £219 was received. An inquiry as to the profits received from the *Ice Company*, and the profits received from the carrying

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company, the *Red Cross Company*, in respect of ice supplied by the order of the Defendant to the smacks of the company, and in respect of the fish carried by the vessels of the carrying company from smacks of the Plaintiff company, and an inquiry as to the sums received by him. Then an inquiry when those sums were received, and a certificate of the amount with interest at 5 per cent. from the time when they were received. Then an order for payment fourteen days after the date of the Chief Clerk's certificate.

Solicitors for Plaintiffs: *Collyer-Bristow, Withers, Russell & Hill*, agents for *Millington & Simpson, Boston.*

Solicitors for Defendant *Ansell: Bell, Brodrick & Gray*, agents for *J. T. & H. Woodhouse, Hull.*

Solicitors for Defendant *Hadfield: J. Cotton & Co.*, agents for *W. Brown, Great Grimsby.*

M. W.

C. A. 1888 STIRLING, J. *May* 15, 17. C. A. *July* 4.

MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY *v.* RICHARDS.

[1887 M. 1690.]

Building Society—Arbitration—Action against Directors, Members of Society, for retaining Moneys of the Society—Building Societies Act, 1884 (47 & 48 *Vict. c.* 41), *s.* 2.

An action was brought by a building society, registered under the *Building Societies Acts*, against former directors and the former secretary for an account of sums of money which, as alleged, they had received on behalf of, and had not accounted for to, the society, but had appropriated them to their own use. The Defendants were members of the society, the 49th rule of which stated that in case of dispute arising between the society and any members thereof it should be settled by arbitration. On a summons taken out by one of the Defendants asking that the action should be stayed, and that the dispute should be referred to arbitration, in accordance with the rule, and in pursuance of the *Building Societies Act*, 1884 (47 & 48 Vict. c. 41, s. 2):—

Held, by *Stirling*, J., and by the Court of Appeal, that a claim by a society against its officer for misappropriating and keeping in his hands moneys of the society, was not a dispute between the society and a member thereof "in his capacity of a member" within the meaning of the *Building Societies Act*, 1884, and that the action ought not to be stayed.

THIS society was registered under the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42), and the subsequent Acts amending it. The Defendants were former directors, and executors of former

directors, of the society, and the former secretary. The statement of claim alleged that while the Defendants and testators were directors and secretary, they received on behalf of the society sums of money which they ought to have paid over or accounted for to the society—that they also retained in their own hands sums of money which they deducted from advances made by the society, and in respect of which they charged the society in account with the whole of the advance without making any allowance in respect of such deduction, and appropriated the amount so deducted to their own use—further, or in the alternative, that the Defendants and testators in consideration of their making, as such directors and secretary, on behalf of the society, advances on mortgage out of the society's moneys, received from the persons to whom such advances were made sums of money by way of bonuses or bribes. The Plaintiff society claimed that an account might be taken of all moneys received or retained by the Defendants or the said testators, and which they ought to have paid over to, or accounted for to, the society; payment of the amount so received or retained; and damages for breach of trust.

The 17th rule of the society stated that "the qualification for each director shall be fifty shares, ten of which must be fully paid up on election," and the 49th rule was that "in case of dispute arising between the society and any members thereof, or the legal representatives of any members, it shall be settled by arbitration."

The Defendant *Richards*, a former director, who had not yet put in a statement of defence, took out a summons asking that the action should be stayed, and that it should be referred to arbitration in accordance with the rules, and in pursuance of the *Building Societies Act*, 1884.

Richards, by his affidavit in support of the summons, deposed that the sums of money referred to in the statement of claim, and in respect of which it was sought to make the Defendants liable, were received by them under and by virtue of the rules of the society and under the advice of the Defendant, *Marshall*, the then secretary, and with the cognizance of the then solicitor, and that the deponent was advised and believed that this was a

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dispute between the society and its members within the rules. The solicitor by affidavit denied that the sums had been received with his cognizance, and went on to say that the case of *Richards* was that he was entitled to be paid the sums he had retained, for work and labour done as a surveyor on behalf of the society.

The 23rd rule of the society provided that all properties offered to the society should first be surveyed by two at least of the directors, for which a charge should be made, and it provided for payments to the surveyor if a special survey should be considered necessary. The directors, it appeared, had surveyed properties, and retained to their own use the amount of the charges for such surveys.

The summons was heard before Mr. Justice *Stirling* on the 15th of May, 1888.

T. Lee Roberts, and *J. G. Pease*, for the summons :—

It is submitted that the claim which is made by the Plaintiff society arises out of a dispute between the society and a member of it, and that it ought to be referred to arbitration. It comes within the first part of the 2nd section of the *Building Societies Act* of 1884 (47 & 48 Vict. c. 41), which enacts that "the word 'disputes' in the *Building Societies Acts*, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member, or any representative of a member, in his capacity of a member of the society, unless by the rules for the time being it shall be otherwise expressly provided"; and it is not a case which comes within the next part of the section, which is that "in the absence of such express provision, shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed, or any contract contained in any document, other than the rules of the society, and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled." The directors were members of the society. They had to take shares to qualify themselves for the office, and

the 49th rule of the society distinctly states that "in case of dispute arising between the society and any members thereof . . . it shall be settled by arbitration." In *Walker* v. *General Mutual Building Society* (1) it was held that though a retired member might be in a sense a creditor he was still so far a member as to be bound by the rules, and that the dispute in reference to his claim to be repaid his subscriptions must be referred to arbitration. The action in the *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Martin* (2) was brought upon a covenant in a mortgage deed, and the question turned upon the construction of a part of sect. 2 of the Act of 1884. The case may be referred to by the other side, as it was decided on appeal that the action should be allowed to proceed. It was, however, stated that but for the section the dispute must have been referred to arbitration. The claim, or dispute, in this case arises out of the relation of the directors to the members of the society, and the observations of Lord Justice *Fry* in *Walker* v. *General Mutual Building Society* (3) are strictly applicable. The 49th rule of this society came before the House of Lords in March, 1884, in *Municipal Building Society* v. *Kent* (4), and it was held that the High Court had no jurisdiction to entertain an action by the society against a member for moneys due to it under covenants in mortgage deeds executed by the members as such to the society. The Act of 1884 was passed in August of that year, but the decision of the House of Lords clearly shews that disputes arising out of contracts collateral to the social contract come within the scope of the rule. On these grounds the proceedings in the action should be ordered to be stayed, and the claim be referred to arbitration.

T. Willes Chitty, for the Plaintiff society:—

This claim is not a dispute within the first part of sect. 2 of the Act of 1884, and the Defendant *Richards* should be required to put in his defence to the action. He is the only one of the Defendants who has not pleaded, but has taken out a summons asking for a reference. The claim made against the Defendants

(1) 36 Ch. D. 777.
(2) 17 Q. B. D. 66, 609.
(3) 36 Ch. D. 786.
(4) 9 App. Cas. 260.

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is for an account of divers sums of money alleged to have been received by them, and which were in effect bribes from the parties to whom advances were made, a matter wholly extraneous to being a director. The Defendant *Richards* was a director when the moneys were received; possibly, but for being a director he would not have received any. The moneys were received and the society was charged with the whole amount advanced without any deduction being made. The 16th section, sub-sect. 9, of the Act of 1874 (37 & 38 Vict. c. 42) is the one which applies to the rules of this society, and which requires that there shall be a rule "whether disputes between the society and any of its members, or any person claiming by or through any member, or under the rules, shall be settled by reference to the Court, or to the Registrar, or to arbitration." But here the directors are sued in their fiduciary relation to the society, and not as directors, and members of the society. The fact of their being members was a mere accident arising out of the 17th rule. The Act of 1884, passed after the decision in *Municipal Building Society* v. *Kent* (1), was intended to make the rules plainer; but the dispute does not arise out of the position of the Defendants as members, but because they were directors and trustees. In *Sinden* v. *Banks* (2) the action was by the trustees of a friendly society formed under the statute 10 Geo. 4, c. 56, against their treasurer for moneys received by him, and the Court refused to set aside the verdict given for the society. In *Morrison* v. *Glover* (3) the action was for breaches of covenant in respect of money lent on mortgage to a member of a society, and the Court held that as to some part of the claim it was not the matter in dispute between the society and the defendant as member, but only as mortgagor, and that the society was not bound to refer to arbitration, but by the decision in *Municipal Building Society* v. *Kent* that case is no longer law. This case, however, does not arise out of any social contract, but simply in consequence of the Defendants having been directors.

[STIRLING, J., referred to *In re Leicester Club and County Race-course Company* (4), and asked if that was not a similar case?]

(1) 9 App. Cas. 260.
(2) 3 E. & E. 623.
(3) 4 Ex. 430.
(4) 30 Ch. D. 629.

It is submitted that it is not; as the directors are sued not as members but in their fiduciary capacity. The proposition in that case is not disputed. Here the question is, is the dispute with the Defendant *Richards* merely as a member? It will be a serious thing to refer such a claim as this to arbitration. The anxiety of the Defendant *Richards* is to prevent the question being heard in public, but it is not really a proper case for arbitration. He should be required to put in his defence to the action, and that will give him an opportunity of shewing the nature of the dispute between him and the society. The other Defendants have put in their defences and prefer a public inquiry, and the trial will come on in the ordinary course. The summons should be dismissed with costs.

J. G. Pease, in reply:—

The Act of 1884 was intended to exclude disputes in reference to mortgages and to the construction of documents from the rules of the society. *Sinden* v. *Banks* (1) was decided under the older law, and whether any distinction can be drawn between the position of a treasurer and that of a director is a question for consideration, but certainly a treasurer has other duties to perform and greater opportunities of committing frauds, while a director is merely a member chosen by the other members to perform certain duties. The secretary is not required to be a member. He was one, however, in this case; but the directors must be members. The object of sect. 2 of the Act of 1884 was merely to except two classes of disputes from arbitration—those arising under mortgages and out of contracts other than those arising under the rules, the decision in the case of *Municipal Building Society* v. *Kent* (2) being that every dispute between members should be referred to arbitration. The meaning of the section should not be cut down in any way and the reference should be allowed.

1888. May 17. STIRLING, J.:—

This is an action brought by the Plaintiff society against former directors and secretary of the society. The object of it is

(1) 3 E. & E. 623. (2) 9 App. Cas. 260.

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to recover from the Defendants certain sums of money which it is alleged they received; and which, by reason of the fiduciary relations existing between them and the society, should not, it is said, remain in their hands, but should be ordered to be paid into the coffers of the society. The summons which has been taken out by the Defendant *Richards* asks that the action should be stayed upon the ground that the legislation on the subject provides that the question in dispute shall be referred to arbitration. In considering whether this is so it will be necessary to have regard to such legislation and certain decisions of the Courts. The course of legislation has been that by the statute (10 Geo. 4, c. 56), which was passed "to consolidate and amend the laws relating to friendly societies," it was by sect. 27 provided, in substance, that provision should be made by one or more of the rules of every such society for a reference to arbitration of every matter in dispute between any such society and any individual member thereof or person claiming on account of any member, and if the matter in dispute should be referred to arbitration, whatever award should be made by the arbitrators should be binding and conclusive on all parties without any appeal, and should not be removed into any Court of Law or restrained by an injunction of any Court of Equity; and by the statute (6 & 7 Will. 4, c. 32), which was passed for the regulation of benefit building societies, it was enacted that the provisions of the 10 Geo. 4, c. 56, and the 4 & 5 Will. 4, an Act passed to amend that statute, so far as the same might be applicable to the purpose of any benefit building society, and to framing, certifying, enrolling, and altering the rules thereof, should extend and apply to such benefit building society and the rules thereof. Thereafter there were many cases the decisions in which shew what was the nature of the dispute which was to be referred to arbitration under the provisions of sect. 27, and the leading case is that of *Morrison* v. *Glover* (1). That was a case where a building society had lent money to a member on mortgage of leaseholds and the member covenanted to observe and fulfil the rules of the society, and to pay the rent reserved by the lease. The society sued in respect of breaches of the covenants, and the Court held that as

(1) 4 Ex. 430.

some part of the plaintiff's claim was not a matter in dispute between the society and the defendant as member, but only as mortgagor, the society was not bound to refer to arbitration the subject-matter of the action. The decision in that case was followed in a series of others to the same effect. That being the state of the law the statute of 1874 (37 & 38 Vict. c. 42), "to consolidate and amend the laws relating to building societies," was passed, and that is the statute which now governs building societies. Sect. 16 of that statute shews what matters are to be set forth in the rules, and amongst others is this (in the language of sub-sect. 9), "whether disputes between the society and any of its members or any person claiming by or through any member, or under the rules, shall be settled by reference to the Court, or to the Registrar, or to arbitration." Upon the true construction of that statute there arose a considerable difference of opinion, which was finally set at rest in the case of *Municipal Building Society* v. *Kent* (1) in the House of Lords. The House consisted of the Earl of *Selborne*, Lord *Blackburn*, and Lord *Watson*, and their Lordships did not agree. The Earl of *Selborne* said (2): "If I had to construe the arbitration clause in these rules, without reference to any statute or other authority, it would certainly appear to me to relate to disputes under the rules, between members (in that character) or their representatives, in respect of their rights or liabilities as such, and the society; and not to questions arising out of contracts or special stipulations in deeds executed between members and the society, and embodying contracts collateral and additional to the social contract though of a nature contemplated and authorized by it; nor to any questions between the society as mortgagee, and one of its members as mortgagor, with reference to the legal consequences of, or rights and liabilities resulting from, the relation of mortgagor and mortgagee. All the authorities decided under the statute which regulated societies of this kind before 1874 are in accordance with that view. *Morrison* v. *Glover* (3) was so decided on the broad ground that a question arising out of breaches of contract in a mortgage deed executed to a building society by

(1) 9 App. Cas. 260. (2) 9 App. Cas. 267.
(3) 4 Ex. 430.

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one of its members was a dispute 'not between the society and the defendant as a member of the society, but between them as mortgagor and mortgagee.'" His Lordship then referred to several cases and to the history of the legislation upon the subject, and said (1): "This being so, I cannot assent to the opinion that the decisions under the earlier Act, so far as they depend upon the meaning of the words by which the subject-matter of arbitration was therein defined, are displaced or rendered inapplicable by the use of words of either larger or clearer, or in any way different signification, in the later Act." The opinion of his Lordship did not however prevail. The action in that case, brought by the society, related to the enforcing of claims arising under covenants in a mortgage deed executed by a member of the society. The other Lords present were Lord *Blackburn* and Lord *Watson*, and they were of opinion that the dispute was one between the society and one of its members within the meaning of the 49th rule as to arbitration, and consequently the decisions of the Courts below, which ordered a stay of the action, were affirmed and the appeal was dismissed with costs. In that state of things the statute of 1884 (47 & 48 Vict. c. 41), "to amend the *Building Societies Act*, 1874," was passed. By sect. 2 it was enacted that "the word 'disputes' in the *Building Societies Acts*, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member, or any representative of a member in his capacity of a member of the society, unless by the rules for the time being it shall be otherwise expressly provided; and, in the absence of such express provision, shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed, or any contract contained in any document, other than the rules of the society, and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled." It is remarkable that that section follows very closely the language which I have quoted from the Earl of

(1) 9 App. Cas. 271.

Selborne's speech in the case of *Municipal Building Society* v. *Kent* (1); notwithstanding, it has not been found very easy to construe that section. Naturally it would be supposed that the meaning of the Legislature was to bring the law into the state in which the Earl of *Selborne* supposed it to be apart from the authorities and the decision of the House of Lords. The point came before a Divisional Court of the Queen's Bench in April, 1886, in the case of *Western Suburban and Notting Hill Permanent Building Society* v. *Martin* (2). In that case, in which a building society sued a member of the society upon a covenant contained in a mortgage deed, the learned Judges, Mr. Justice *Grove* and Mr. Justice *Stephen*, held that the dispute was one between the society and a member in his capacity of member within the meaning of sect. 2 of the Act of 1884, and that the member was entitled to have referred to arbitration a dispute as to whether or not he had paid moneys alleged to be due from him to the society under the mortgage deed. Mr. Justice *Stephen* said (3): "The words of the enactment do certainly follow very closely some of the expressions used by Lord *Selborne* in his judgment, and thus afford plausible ground for the argument that it was intended to give the force of law to his judgment; but when this matter is more closely considered it seems to us that this is not its effect. The authority of Lord *Blackburn* and Lord *Watson*, as well as that of the late Master of the Rolls, Sir *G. Jessel*, may be quoted for the proposition that a dispute between a society and its mortgagor on a mortgage is a dispute between the society and its members as such, and the reason which they give for that opinion appears to us to be valid. It accordingly follows that the restriction of the word 'dispute' to disputes between the society and its members in their capacity as such does not prevent the arbitration clause from applying to this case."

That decision was appealed from, and reversed by the Court of Appeal, consisting of the Lord Chancellor, Lord *Herschell*, Lord *Esher*, M.R., and Lord Justice *Fry*, in May, 1886 (4).

Lord *Herschell*, after stating the law and referring to Lord *Selborne's* expressions in the case of the *Municipal Building*

(1) 9 App. Cas. 260.
(2) 17 Q. B. D. 66.
(3) 17 Q. B. D. 72.
(4) Ibid. 609.

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Society v. *Kent* (1), said (2): "In that state of the law the Act of 1884 was passed, which purports obviously, in some way or other, to limit the meaning of the word 'disputes' in the *Building Societies Acts*, and in the rules of any society thereunder, and which was to extend to existing rules as well as to future rules, as is clearly shewn by the proviso at the end of the section. It appears to me, with great deference to the learned Judges in the Court below, that they have not given sufficient weight to this fact. I cannot help thinking that the section was passed for the purpose of giving to the rules that meaning which Lord *Selborne* said that, apart from the question of authority, he should himself put upon them. I do not think it is necessary to decide this in the present case." Then his Lordship proceeded to decide the question before the Court by reference to the clause of sect. 2 which enacts that "the word 'disputes' . . . in the absence of such express provision, shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed, or any contract contained in any document, other than the rules of the society, and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled." Lord *Esher* and Lord Justice *Fry* did not express any opinion differing from that of the Lord Chancellor, but they declined to give or abstained from giving any opinion as to the meaning of the earlier part of the section. There has since been another decision by the Court of Appeal in the case of *Walker* v. *General Mutual Building Society* (3), but it does not throw any great light upon the meaning of the Act of 1884. That case was really governed by the decisions in cases prior to the Act of 1874, with reference to which Lord Justice *Bowen* said that the Court was bound by them, and "for this reason, that those decisions have been accepted by the Courts, and subsequent legislation has gone upon the assumption that the interpretation so put upon the law by the Courts would continue to prevail."

(1) 9 App. Cas. 260. (2) 17 Q. B. D. 613.
(3) 36 Ch. D. 777, 784, 785.

That being the state of the decisions by the Courts, it cannot be said that at this moment the true construction of sect. 2 of the Act of 1884 has been finally arrived at, but I think that the opinion which was expressed by Lord *Herschell* in the words to which I have referred is the better one, viz., that sect. 2 "was passed for the purpose of giving to the rules that meaning which Lord *Selborne* said that, apart from the question of authority, he should himself put upon them." The effect is that substantially the law has been brought back to the state in which it was before the Act of 1874, but with this addition, that any society may expressly provide by rules that disputes shall be referred to arbitration which could not be so referred prior to the Act of 1874. In the present case, as I have already stated, the question is whether the directors and secretary are bound to account for certain sums which have come to their hands. The 17th rule shews that the qualification for each director shall be fifty shares, ten of which must be fully paid up on election, but the rule relied on is the 49th, which states that "in case of dispute arising between the society and any member thereof .... it shall be settled by arbitration." This society was formed before the Act of 1884, but I observe in the certificate of the Registrar of Building Societies that the rules of the society were in February, 1886, altered. That was some time after the passing of the Act of 1884. The alterations are included in the official copies of the rules, and it appears that the society did not take the advantage which they might have done of altering the rules in this respect. That being the position of the matter, I think I am bound to take notice of the case of *Sinden* v. *Banks* (1), which was decided in February, 1861. There the plaintiffs were trustees of a friendly society which was formed under the statute of 10 Geo. 4, c. 56. The defendant was the treasurer. He resigned his office in April, 1856. The action was commenced to recover from him the sum of £30, the balance of moneys received by him in May, 1853, as treasurer. The jury returned a verdict for the plaintiffs, and the learned Judge gave the defendant leave to move to set it aside and enter the verdict for him instead. The arguments upon the rule, which was obtained for the defendant, were heard before

(1) 3 E. & E. 623.

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Mr. Justice *Crompton* and Mr. Justice *Hill*, and they discharged the rule. In this case I have to deal with a claim made against the directors and secretary of the society which does not arise simply out of their relationship as members, but arises out of an obligation cast upon them by reason of their standing in a fiduciary relation to the ordinary members, and I do not think that I can distinguish between their position and that of the treasurer in *Sinden* v. *Banks* (1). I adopt, as applicable to this case, the words of Mr. Justice *Hill*, where he said (2): "I think that we should strain the language of the legislature far beyond its natural meaning, if we held that the claim of a society upon its treasurer for misappropriating and keeping in his hands the moneys of the society, is a dispute between the society and one of its members, within the meaning of" the enactment.

And to that language I wish to make this addition, that in cases of this sort it may well be that a society would wish to preserve the remedy by action against persons who have deprived them of moneys which ought to be in the society's hands. In such an action the plaintiffs have certain powers, in respect of discovery and other proceedings before the trial in Court, which might be considered by the society to be much more effective than any proceedings which could be taken in an arbitration. It was and is within the power of the Plaintiff society to alter their rules so as to make them embrace a dispute of this description; but of that power they have not chosen to avail themselves possibly for the reason I have just suggested; and I am of opinion that I ought not to order a stay of the proceedings in the action, but allow the Plaintiff society to pursue them in the ordinary way.

T. F. M.

Richards appealed, and the appeal was heard on the 4th of July, 1888.

T. Lee Roberts, for the appeal:—

The claim is for fees which *Richards* received under rule 23. Such a claim is a dispute by the society with a member in his character of member: *In re Leicester Club and County Racecourse*

(1) 3 E. & E. 623. (2) 3 E. & E. 633.

Company (1). But if not, it is a dispute between the society and a member as to the effect of rule 23, *i.e.*, as to the effect of a contract contained in the rules, and therefore, according to the Act of 1884, s. 2, the dispute is one to be referred to arbitration: *Municipal Building Society* v. *Kent* (2). It was held in *Walker* v. *General Mutual Building Society* (3) that a dispute very similar to this must be referred to arbitration, and the observations of Lord *Herschell* in *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Martin* (4) are in favour of arbitration.

Le Riche, for some of the co-Defendants.

T. Willes Chitty, for the society, was not called upon.

COTTON, L.J.:—

This is an application by way of appeal by a former director of a building society, seeking to stay an action brought by the society against him and other former directors, and to have the matters in dispute referred to arbitration. He urges that the dispute is between the society and him in his capacity of a member, and in support of this he relies upon *In re Leicester Club and County Racecourse Company*, where Mr. Justice *Pearson* held that fees payable to a director, who was by the rules obliged to be a member, were payable to him in his character of a member. I am of opinion that that decision does not bear on the present case. The questions raised by the statement of claim are not questions as to payment of directors' fees; the case made is that the directors improperly received and retained sums of money belonging to the company, which they ought not to have received, or ought to have paid over to the society. It is a case where the society could not know anything as to the amounts received, and the case is not a suitable one to be referred to an arbitrator. The Act does not provide that a case such as this shall be so referred. The Act of 1884 (47 & 48 Vict. c. 41), s. 2, enacts that "the word 'disputes' in the *Building Societies Acts*, or in the rules of any society thereunder, shall be deemed to refer

(1) 30 Ch. D. 629.
(2) 9 App. Cas. 260.
(3) 36 Ch. D. 777.
(4) 17 Q. B. D. 609, 612.

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only to disputes between the society and a member, or any representative of a member in his capacity of a member of the society, unless by the rules for the time being it shall be otherwise expressly provided; and, in the absence of such express provision, shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed, or any contract contained in any document, other than the rules of the society . . . ." This action does not proceed against the Appellant in his capacity of a member, but as being in a fiduciary position and having received moneys for which he ought to account, nor does it proceed upon any question as to the construction of the rules, but upon the general law that a man shall not be allowed to receive and keep moneys which do not belong to him. There is no affidavit by the Appellant that the fees for surveying are the only moneys to which, so far as concerns him, this action relates. I am of opinion that the appeal fails.

BOWEN, L.J.:—

I am of the same opinion and have nothing to add.

FRY, L.J.:—

I entirely agree.

Solicitors: *C. A. Russ*; *Kent, Mills & Co.*; *Le Riche & Norman.*

H. C. J.

LOCKE *v.* DUNLOP.

C. A.
1887
STIRLING, J.
May 7, 10, 14.
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1888
July 24, 25.

[1886 L. 726].

Will—Limitation to "every other Son or Sons"—Eldest Son excluded—"Begotten and to be begotten."

A testator devised real estate to his second son for life, with remainder to his first and other sons in tail male; with remainder to the testator's third son for life, with remainder to his first and other sons in tail male; with remainder to the testator's fourth, fifth and every other son and sons to be begotten, born, or *en ventre sa mère* at the time of his decease, successively in tail male; with remainder to the testator's daughters begotten or to be begotten equally as tenants in common in tail. All the testator's sons except the eldest having died without issue male the eldest son claimed the estate:—

Held (affirming the decision of *Stirling*, J.), that, having regard to the various limitations of the will, the eldest son was excluded from taking under the expression "every other son."

Although the words "to be begotten" do not in their primary legal sense point to futurity, yet they will be held to do so if such an intention can be gathered from the will.

Langston v. *Langston* (1) and *In re Blake* (2) distinguished.

THIS was an action brought by *Wadham Locke*, the eldest son of the late *Wadham Locke*, for a declaration that according to the true construction of his father's will he was entitled to the mansion-house and estate called *Rowdeford*, in the county of *Wilts*.

By his will, dated the 8th of October, 1829, *Wadham Locke* devised his mansion-house called *Rowdeford*, with certain lands therein mentioned, to two trustees and their heirs to the use of his wife during widowhood, and after her decease or second marriage to the use of his second son *Francis A. S. Locke* and his assigns for his life, without impeachment of waste, with remainder to the use of trustees to preserve contingent remainders, and after his death to the use of the first, second and every other son of the body of his said second son in tail male, with remainder to similar uses in favour of the testator's third son *John Locke* for his life, and after his death of his first and other sons in tail male, with remainder in the following words, "And for default of such issue to the use of my fourth, fifth and all and

(1) 8 Bli. (N.S.) 167; 2 Cl. & F. 194. (2) 19 W. R. 765.

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every other son and sons of my body on the body of my said wife to be begotten, born, or *en ventre sa mère* at the time of my decease, severally, successively, and in remainder one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons and the heirs male of his body to be always preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing; and for default of such issue to the use of all and every my daughter and daughters on the body of my said wife begotten, or to be begotten, born, or *en ventre sa mère* at the time of my decease, to be equally divided between them share and share alike, to take as tenants in common and not as joint tenants, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing," with cross remainders between them, and with an ultimate limitation to the use of the testator's right heirs. The testator also devised certain specific freehold and leasehold estates to his son *Francis A. S. Locke* absolutely; and then devised certain other real estates to trustees for 500 years, and subject thereto to the use of his son *Francis A. S. Locke* for life, and after his death to the use of his first and other sons successively in tail male, and for default of such issue upon the same uses as were thereinbefore declared concerning the mansion-house and lands at *Rowdeford*. The trusts of the term of 500 years were declared to be to raise in aid of his personal estate portions of £6000 each by way of mortgage for all his children, whether born or *en ventre sa mère* at the time of his decease, other than and except his eldest son *Wadham Locke* and his said other sons *Francis A. S. Locke* and *John Locke* who were (as the testator stated) all otherwise provided for, to be paid to such of them as should be sons at twenty-three, and to such of them as should be daughters at twenty-one or marriage. The testator also made provision for the maintenance of his children during their minorities, and gave a specific bequest to his third son *John;* and bequeathed his residuary personal estate to his trustees upon trust for conversion and payment of his debts and legacies, and then upon the same

trusts as the moneys directed to be raised under the term of 500 years. Other details of the will are referred to in the judgment of Mr. Justice *Stirling*.

The testator died on the 21st of October, 1835. His wife survived him, and died on the 6th of July, 1838. He left eight children, namely, the Plaintiff, *Wadham Locke*, who was his eldest son, the said *Francis A. S. Locke*, and *John Locke*, and five daughters, all of whom were living at the date of his will.

Francis A. S. Locke died on the 6th of January, 1885, and *John Locke* on the 13th of February, 1886. Both of them died without issue male.

Two of the daughters were dead, one of whom had left male issue.

The Plaintiff claimed the *Rowdeford* estate as tenant in tail under the devise to "my fourth, fifth, and all and every other the son and sons of my body on the body of my said wife to be begotten, born, or *en ventre sa mère* at the time of my decease, &c." The Defendants were persons claiming under the testator's daughters.

The action came on for hearing before Mr. Justice *Stirling* on the 7th of May, 1887.

Pearson, Q.C., and *Waggett*, for the Plaintiff.

Hastings, Q.C., and *Vernon R. Smith*, for the Defendants.

STIRLING, J. (after stating the material portions of the will of *Wadham Locke*, proceeded as follows):—

At the date of the will the testator had three sons, all of them had attained twenty-one, the second and third, *Francis* and *John*, being unmarried, and at the same date he had also five daughters, none of whom were married, the youngest being, I think, about twelve years old. I confess upon reading the whole of the will, that if I had not to pay regard to the authorities, to which of course I am bound to have regard, I should say that the meaning of it, construed simply as an ordinary document in the English language, would appear to be tolerably plain. The testator takes notice of the state of his family. He says expressly in one of

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the passages which I have read that he has only three sons, but at the same time he contemplates the possibility of his having others. He refers to the fact that he has daughters, and he contemplates that he may have others. In speaking of the children for whom he provides by means of the 500 years' term, and out of the residuary personal estate, he uses this language—he gives portions to such of them as shall be sons, and says, "should I have any son hereafter, I having at present only the three, at their respective ages of twenty-three years," and then speaking of the daughters he gives portions to such of them "as are or shall be daughters at their respective ages of twenty-one years or days of marriage." The language in which he speaks of the sons is unmistakably language importing futurity, and this seems all the more forcible when it is contrasted with the language in that part of the will in which he speaks of such of them as are or shall be daughters. Then he says the three sons are otherwise provided for. It is remarkable that the will contains no provision whatever in terms for the eldest son. If the limitations in favour of the first-mentioned son *Francis* and his sons had taken effect, and the estate tail created in the sons of *Francis* had been barred, the eldest son would have taken nothing at all. So that he must have considered the eldest son amply provided for by property outside the will altogether. We know, in point of fact, that the eldest son was entitled in remainder to large settled estates to the annual value of something like £1700 a year. Then, as regards the other two sons to whom he gives nothing out of his personal estate, or out of the term of 500 years, he does make provisions for them by will, and we do not know of any provision outside the will for them. To the second son *Francis* he gives a first estate for life in the property which is now in question. He also gives him a first estate for life in the property which is subject to the 500 years' term, and he gives him specifically certain real estate, the value of which we do not know. Then he provides for *John*, the third son, by giving him personalty, which is stated on the face of the will to be over £6000, and in addition certain leaseholds. To the future children, including the fourth and other sons, for whom he provides out of the term of 500 years and out of the personalty,

he gives £6000 each. That being so, when we turn to the limitations in question, and remember that *Francis* and *John* at that time were unmarried, and therefore that the words "to be begotten," when used in the limitations to their sons, are used not inconsistently with their importing futurity, when we find that he gives in default of issue of *Francis* and *John*, "to the use of my fourth, fifth, and all and every other of the son and sons of my body on the body of my said wife to be begotten," and when we find that the limitation in favour of the daughters is "to the use of all and every my daughter and daughters on the body of my said wife begotten or to be begotten," and when we find that in providing for his younger children out of his residuary personal estate, and out of the term of 500 years, he has distinct regard to the fact that he has no other sons than those three, and uses language which unmistakably imports futurity in providing for sons, it seems to me that, upon the will itself, without anything more, and, as I say, if regard were not had to the authorities, one would come to the conclusion that the words "to be begotten" in the limitation to the fourth and fifth and all and every other son and sons of the body, did import futurity, and therefore that he meant to include under that limitation the future sons only, and did not intend to include in it the eldest son of all. Upon the assumption which the testator evidently made, that the eldest son was already well provided for outside the will, the whole of that provision would be, it seems to me, plain, intelligible, and rational. Now, the limitations in favour of the sons of *Francis* and *John* have not taken effect; they are both dead, and the question is, whether the Plaintiff, who, as I say, is the eldest son of the testator, can take under that limitation to the "fourth, fifth, and all and every other son and sons of my body on the body of my wife to be begotten," or not.

It is contended on his behalf that the words "to be begotten" have a strict legal signification, and that, as it is put in the old books, the words *procreatis* and *procreandis* mean the same thing; that he is another son of the testator, and therefore is entitled under that limitation. Upon that, without dealing with any authorities, there seem to be two remarks. In the first place, although, no doubt, the Plaintiff is another son of the testator,

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and although it may be that he is capable of taking under that description, yet when we find limitations first of all to the second son, and then to the third son, and then this limitation to the "fourth, fifth, and every other son," the words "other son" are not apt and appropriate words for a gift in favour of the eldest son. Although it may be under those words "every other son" the eldest son may take if there is an indication of intention to that effect to be found in the other parts of the will, or even if there is nothing to be found in the will to the contrary, yet it would seem *à priori*, and in the absence of decision, to be a construction which would yield to an expression of intention to a contrary effect to be deduced from the other parts of the will. Then, secondly, that construction in favour of the Plaintiff appears to me to be open to this observation. The limitation which I have read is followed by this direction, "The elder of such son and sons and the heirs male of his body to be always preferred and to take before the younger of such son and sons and the heirs male of his and their body." So that if, under the limitation in favour of all and every other son and sons, the eldest son comes in, it seems to me that the logical consequence is, that he and his issue must come in before the fourth. Now, it is very difficult to find any intelligible reason for that. He gives the estate unquestionably to the third son in priority to the eldest; the provision in favour of the third son is shewn on the face of the will to be more than £6000, which is the provision that he makes for the fourth son. I confess I see no reason why he should desire to put in the eldest son, for whom by the will he makes no provision at all, and whom he seems to treat as amply provided for outside the will, in front of the fourth son, for whom he provides £6000, and yet after the third son, for whom he makes a larger provision. That is a result which tends to shew caprice on the part of the testator. No doubt there is this observation to be made, which was made in the argument, that in some respects the will is capricious, for it is to be observed that the limitations after the death of *Francis* and after the death of *John* are to their sons in tail male only, so that daughters of *Francis* and *John* are cut out, while, when we come to the limitations to the daughters of the testator, the limitation is to them in

tail general. Still the third and fourth sons would seem to be so nearly in the same position that a construction which makes a difference between them renders the will in that respect capricious and unintelligible. Upon that ground also I should say that, if the rules of the Court permit of it, the construction which would give the estate to the Plaintiff is a less natural and intelligible construction than that which gives the estate to the Defendants.

But, of course, I cannot deal with the case apart from the authorities, more especially as I am dealing with limitations of real estate, and to them I must now turn. But, in the first place, and before I deal with those which were cited, I should like to refer to a rule laid down in the case of *Abbott* v. *Middleton* (1), and repeated by Lord *Cairns* in his address to the House of Lords in the case of *Bathurst* v. *Errington* (2). Lord *Cranworth* says: and Lord *Cairns* repeats: "Where by acting on one interpretation of the words used we are driven to the conclusion, that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious or even harsh and unreasonable." So that the rule of the Court is this, that if we find language in a will which is capable of being used in what I may call a primary and secondary sense, and if we find that the primary meaning, if applied, gives a construction which would lead to the conclusion that the person using it is acting capriciously and without intelligible motive, and contrary to the ordinary mode in which men generally act in similar cases, then we may adopt the second; and *à fortiori* it follows that, if by adhering to the primary sense of the words we come to the conclusion that the testator is acting in the ordinary mode in which men generally act in similar cases, and his will is intelligible

(1) 7 H. L. C. 68, 89. (2) 2 App. Cas. 698, 709.

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and devoid of caprice, it is the duty of the Court to adhere to that primary signification. The first case which was cited, and I think on the whole that which was most relied on, was the case of *Langston* v. *Langston* (1). There the testator "devised his manors and hereditaments to trustees upon trust to convey the same to the use of *J. H. L.* (his eldest son) for life; with remainder to trustees to preserve contingent remainders; with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of *J. H. L.* severally and successively in seniority of age and priority of birth in tail male." So that there was no remainder in terms to the use of the first son in tail, and the question was whether the first son did take. The case is a long one as reported, it was carefully gone into upon the argument, and I shall not go through the whole of it; but I may refer to this, that Lord *Brougham*, the Lord Chancellor, in giving judgment (2), gives four special reasons for his judgment founded on other parts of the will than those which he was called upon to construe. First of all, after referring to the fact that he had looked at the draft and found out a mistake, and saying that he laid that entirely out of view, and it formed no part of the ground on which he gave judgment, he says: "Anybody who reads this will cannot, if he has his senses about him, doubt that some mistake must have happened; and that is a legitimate ground in construing an instrument, because that is a reason derived not *dehors* the instrument, but one for which you have not to travel from the four corners of the instrument itself." Well, in the present case that reason does not apply, because I do not see any ground for even suspecting the existence of any mistake. The next ground which he uses is this, that where the testator really meant to exclude a child, or an eldest child, he knew how to do it. That remark does apply in the present case, because the testator, when he is dealing with the distribution of his personal estate, and with the moneys coming into the term of 500 years, does use positive words of exclusion in regard to the eldest son; so far that is an observation in favour of the Plaintiff. Then he goes to this, that he finds there are eight terms of years provided for by the instrument, and that the existence of

(1) 2 Cl. & F. 194. (2) 2 Cl. & F. 240, 244, 246.

an eldest son of *J. H. L.*, the person mentioned, would defeat all those eight terms, yet it was said that no provision was made for him. Of course, that is a special reason which has no application in the present case. Then he goes to the fourth special reason, which arises from the provision made for younger sons or daughters. After the limitation in favour of the first, second, third, fourth, fifth, and all and every other the son and sons of the body of *J. H. L.*, there is a remainder to the daughters, and there was a provision for raising portions to the amount of £25,000, in case of there being one daughter, for that daughter. Upon that the Lord Chancellor remarks: "It thus appears that this monstrous conclusion indisputably follows, that if there were one son and one daughter, then there is to be charged £25,000 upon the daughter's estate for the behoof of that daughter herself." He says that that is a result which shews that it is almost impossible that that could have been intended. Then we come to the passage upon which reliance was no doubt very properly placed on behalf of the Plaintiff. He says this: "I wish to say a word respecting the force of the term upon which the argument for the appellant mainly rests, the word 'other.' It is said that, if you can construe an instrument without supplying anything, omitting out anything, but upon its own terms, unaltered, unadded to, undiminished, you had better do so, as it is safer to take these terms than to introduce others. I agree with that proposition. Now it does so happen that, if you take these terms as they are here, and neither alter, nor add to nor diminish them, the words themselves that exist upon the face of the will are sufficient to carry an estate tail in the first instance to *Henry Langston*, and to support all the terms and other limitations. But it is said by the Court of King's Bench and by the appellant, that 'other' always means 'younger,' 'posterior'; and no doubt I leaned at first towards that view of the subject. It is a very plausible argument, and it is true in point of fact. If anybody were to say first, second, third, fourth, and other sons, it must mean the sons after the fourth; but why does 'other' mean the sons after the fourth? It is because you have before enumerated all that come before the fourth, for you have said first, second, third, and fourth. But suppose I had just happened to

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have omitted the first, and instead of saying first, second, third, fourth, and other sons—suppose I had said, 'To my second, third, fourth, and other sons,' leaving out the first, then it is perfectly clear that 'other' no longer is of necessity confined to the fifth, sixth, and seventh, but 'other' there *ex vi termini* includes the first, because the first is literally the one who answers the description of something other than the second, third, and fourth. The word 'other' would then just as grammatically, as accurately, as strictly, and as correctly describe the eldest son, as it would describe the fifth, sixth, or seventh son, because the eldest son is a son other than the second, other than the third, other than the fourth." No doubt that case is an authority for saying that an eldest son may take under the words "other son." In the case of *Langston* v. *Langston* (1) the Lord Chancellor, as I have already said, found in other parts of the will grounds for saying that there was an intention that that should be the case. He does not decide, although I think he rather implies it, that if there was nothing in the will to the contrary the same would be the result. I think the true conclusion to be drawn from that case and the cases of *In re Blake* (2), and *Tavernor* v. *Grindley* (3), which were cited, is that if you find the words "other son" used, the eldest son not being previously mentioned may take under that description provided there is nothing else in the will which shews a contrary intention. But in none of the cases to which I have referred, and in no case which I have been able to find, is it laid down that the Court is bound necessarily to give that meaning to the word "other" if you find indications of contrary intention in other parts of the will. The next case was that of *Clements* v. *Paske* (4), which was before *Langston* v. *Langston*. There the testator gave real estate "to trustees for the life of *J. C.*, his nephew, to support contingent remainders, and to permit *J. C.* to receive the rents, &c., for life, remainder to the first and eldest son of his body lawfully issuing, or that is lawfully issued, and to the heirs male of the body of the first son lawfully issuing or issued, and for default of such issue then likewise to the second, third, and every other son of the said *J. C.*

(1) 2 Cl. & F. 194.
(2) 19 W. R. 765.
(3) 32 L. T. (N.S.) 424.
(4) 2 Cl. & F. 230, n.

successively and in remainder, and the several and respective heirs male of the body of every such second, third, or other son;" so that there was no estate tail given to the first and eldest son. There the Court held that, under the words "every other son," the eldest son took an estate tail. That was in accordance also (as in the case of *Langston* v. *Langston* (1)) with indications to be found in other parts of the will, that such was the intention of the testator. Those are all the cases, I think, which directly bear on the force to be given to the word "other." There were two other cases cited which I will deal with together, namely, the case of *Galley* v. *Barrington* (2), and *Doe* v. *Taylor* (3). These were slightly different from the present, but they are very much alike in their general features. In *Galley* v. *Barrington* there was a settlement to the use of *J. G.* for life, remainder to the use of the first son of the body of *J. G.* by *A. S.* his intended wife; and for default of such issue, to the use of the second, third, and other sons of the body of *J. G.* by *A. S.* severally and successively as they shall be in seniority of age, and of the several heirs male of their several bodies. In the case of *Doe* v. *Taylor* there was a devise to my son *A. T.* for life, and from and after the decease of my son *A. T.* then to the first son of my said son *A. T.* lawfully issuing, and for default of such first issue, then to the use and behoof of the second, third, fourth, fifth, and all and every other son and sons, the heirs of his or their bodies lawfully issuing. In *Galley* v. *Barrington* the case was sent from the Court of Chancery, and the reasons are not given, but it was held that the eldest son of the settlor there took an estate tail under the limitations in the settlement. A similar result was arrived at in the case of *Doe* v. *Taylor*, where the reasons are given. There we find upon examination that it did not turn upon the word "other" at all, but upon the words "in default of such issue." It was held that those were properly construed for default of issue of such first son, that therefore there was a general failure of issue meant of the first son, and consequently that that son took an estate tail. It is possible that the same result which was arrived at in *Galley* v. *Barrington* may have been founded on the

(1) 2 Cl. & F. 194. (2) 2 Bing. 387.
(3) 9 L. T. (O.S.) 218; 10 Q. B. 718.

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same reasons, though we do not know. But this observation is common to both cases, that in them the rule which I have cited from *Bathurst* v. *Errington* (1) would apply, that the Court, finding it possible to give what I may call a secondary meaning to the words, gave that secondary meaning so as to avoid a capricious and unintelligible disposition on the part of the testator.

I now come to the cases which deal with the rule of law with reference to the meaning of the words "to be begotten." The rule is a very old one; it is laid down in *Coke* on *Littleton* (2) in these terms: "As *procreatis* shall extend to the issues begotten afterwards, so *procreandis* shall extend to the issue begotten before." And in the note of the editor it is stated that it was adjudged accordingly in a case cited from *Hale's* MSS. "But it is held," the editor goes on to say, "that where the words were *in posterum procreandis*, sons born before shall be excluded on account of the peculiar force of *in posterum*," and the reference is to an anonymous case in the 3rd *Leonard*, 87. When that case is examined, it is found not quite to bear out the statement thus made. It is very shortly reported, and is this: "*A.* made a feoffment in fee to the use of his younger son in tail, and after to the use of the heirs of his body *in posterum procreandis;* and at the time of the feoffment he had issue two sons, and after the feoffment had issue a third son. The younger son died without issue. Upon a motion at the bar, it was said by *Wray*, J., that, after the death without issue of the second son, the land should go to the third son born after the feoffment, for this word (*in posterum*) is a forcible word to create a special inheritance; without that, it had been a general tail." That case is commented upon in another which I shall presently cite, and is there explained. Then the well-known case of *Hebblethwaite* v. *Cartwright* (3), was cited before me, in which there was in the settlement a limitation to the use of the settlor for life, with remainder to the first and other sons in tail male, and then remainder to the settlor's brother for life, with remainder to the heirs male of his body "hereafter to be begotten." Upon that the Lord Chancellor held that the brother took an estate tail, and said that "the

(1) 2 App. Cas. 698. (2) 20 b.

(3) Cas. t. Tal. 31.

words 'hereafter to be begotten' do not confine it to the issue born after, but will likewise take in that born before, the words *procreatis* and *procreandis* being of the same import." "And this," he said, "was to prevent the great confusion which would otherwise be in descents by letting in the younger before the elder." Then in the case of *Hewet* v. *Ireland* (1) that doctrine was also referred to. Provision there was made by deed for securing £600 in trust that the wife should have the interest during her life, and afterwards that it should be paid to such daughter or daughters as should be begotten by the husband on the wife, such payment to be made at their ages of eighteen or marriage. A daughter had been born at the date of the execution of the deed, and no daughter was born afterwards, and the question was whether that daughter took. There the doctrine as to *procreatis* and *procreandis* is cited, and although the words of themselves imported futurity, the Court came to the conclusion that another meaning was given to them, expressly to avoid caprice and unintelligible disposition, because the Lord Chancellor begins by saying: "The parents could never intend to neglect a daughter which was born, and yet so young as not to be capable of offending them (viz., being but ten years old), and at the same time to take care of a daughter to be born, and which might never be born, and in fact never was." All those early cases are cited and discussed in the case of *Doe* v. *Hallett* (2), which one may say is almost the leading authority on this point. There there was a "devise to the use of *A.*, only surviving son of *J. S.*, for life, and to his first and other sons, &c., and for default of such issue to the use of the first, second, and of all and every other son and sons of *J. S.* lawfully to be begotten, and the heirs male of the body of such first and other sons, with proviso that the said *A.* and his first and other sons, and also the first and other sons hereafter to be born of the said *J. S*, should reside at the family house." In that case there was an error in the will. *A.* was not the only surviving son; there was another son born before the date of the will, and there again the Court held, in order to avoid a capricious and unintelligible disposition, that that second son was entitled to take. The case was argued by

(1) 1 P. Wms. 426. (2) 1 M. & S. 124, 136.

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Mr. *Preston* on one side and by Mr. *Holroyd* on the other, and all the preceding cases are gone into and commented upon. After stating the general doctrine as to the words "lawfully to be begotten," and referring to *Hewet* v. *Ireland* (1), and the case of *Cook* v. *Cook* (2), Lord *Ellenborough*, C.J., proceeds to discuss that case in the 3rd *Leonard*. He says: "There the feoffor made a feoffment to the use of his younger son in tail, and after to the use of the heirs of his body *in posterum procreandis*. The case, therefore, did not turn entirely upon the effect of the words '*in posterum*,' for the feoffor's passing by the eldest son in the first instance was a very important circumstance to indicate an intention to exclude that son altogether. I therefore think that what was said by *Wray*, J., in that case was right." So that Lord *Ellenborough* considers that where the eldest son was passed by in the first instance and the words used were *in posterum procreandis*, which translated would be "hereafter to be begotten," there was an intention shewn to exclude the eldest son altogether, and under the words "hereafter to be begotten" the eldest son would not take. Then he goes on to deal with *Hebblethwaite* v. *Cartwright* (3), "where," he says, "the words were to the heirs male of the body 'hereafter to be begotten,' which are the same as *in posterum procreandis* in 3rd *Leonard*, yet Lord *Talbot* held that those words did not confine the limitation to the issue born after, but took in that born before. That decision, indeed, does not affect to overrule the case from *Leonard*, nor does it appear by the report that that case was cited in argument and brought under the view of the Court; still it is to be considered as an express decision of that very eminent Judge upon the construction of these words. The case, therefore, of *Hebblethwaite* v. *Cartwright* disposes of the words *in posterum*." Lord *Ellenborough*, therefore, considers that these two cases, that from *Leonard* and *Hebblethwaite* v. *Cartwright*, are not irreconcilable, but distinguishes them on the ground that, in the case from *Leonard*, the eldest son was passed by in the first instance. It is obvious, therefore, that it was the opinion of Lord *Ellenborough* that the rule as to *procreatis* and *procreandis* was not so absolute but that it would give way upon indication of intention

(1) 1 P. Wms. 426. (2) 2 Vern. 545.
(3) Cas. t. Tal. 31.

to be found in other parts of the will. *Le Blanc*, J., says this (1): "No doubt circumstances might have existed to shew that the testator meant to exclude begotten children by this description, but there are no such circumstances that I can find. The testator limits the remainder to *William* the eldest son, and afterwards to the first and other sons of Sir *Thomas* to be begotten; and if those words comprehend begotten, they will let in a second son then *in esse*, for there does not appear any intention to exclude, but only to give the estate to *William* the first son in the first instance, and afterwards, if he died without issue, to the son next in succession. But it is said the words 'hereafter to be born,' which occur in the last of the two provisoes, indicate an intention to exclude, but as both the provisoes are meant to refer to the same persons, I think the words in the last must be taken not as words of exclusion, but merely of description, meaning those persons who according to the words of the former proviso would, by virtue of the limitations of the will, be entitled after the death of the wife to the next immediate estate. There is therefore nothing to manifest an intention on the part of the testator to exclude *Walter James*, and there is no rule of law which imposes upon the words that the testator has used such a construction as will necessarily exclude him." Therefore *Le Blanc*, J., was also of opinion that the rule as to the construction of the words "to be begotten" did not apply if there was an intention shewn on the part of the testator to exclude children already born. A similar opinion was expressed by *Bayley*, J., who says (2): "If there are circumstances to shew a plain intention to use the words in a more restricted sense, they will bear a construction in conformity with such intention; but it is admitted that there is nothing here to shew such an intention. It is said that *Walter James* does not come within the description of first son of Sir *Thomas Hood*, because *William* was the first son; but first son may mean first son after *William*, at the time of his death without issue, when the remainder was to take effect. I cannot place reliance on the words in the proviso, 'hereafter to be born,' because when I find that the testator was so uncertain of the fact as to state that one was the only son, who

(1) 1 M. & S. 138. (2) 1 M. & S. 139.

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was not the only son, so I cannot say that in using the words 'hereafter to be born,' the testator, who was *inops consilii*, meant to denote thereby a clear intention to confine his bounty to the exclusion of a son then born." Then the next case cited, and so far as I know the last case on the subject, was that of *Almack* v. *Horn* (1). There there was a devise to *A.* and her daughter *B.* for their lives, remainder to all the children of *A.* and *B.* to be begotten as tenants in common in tail, *B.* being the only daughter of *A.* *Held*, that *B.* was entitled in common with her own children to share in the remainder in tail. The Vice-Chancellor (Sir *William Page Wood*) says this: "There is no doubt about the strict legal sense of the words 'to be begotten'; but the question is, how far that sense can be controlled by the language of the will, coupled with the actual circumstances of the family." Then: "The facts stated are—that there was no other child of the daughter than the one to whom a life estate was given, and it was contended, that, upon the principle of *Early* v. *Benbow* (2), this circumstance was sufficient to justify me in departing from the strict legal construction, and reading the words 'to be begotten' in their future sense. In *Early* v. *Benbow* the word was 'born' and not 'begotten,' which is perhaps rather stronger in favour of including all. Originally, the rule by which the words 'to be begotten' were extended to include existing children, was introduced to prevent confusion in descents, as Lord *Talbot* observes in *Hebblethwaite* v. *Cartwright* (3); but it is clear that the rule was afterwards extended to the case of children taking by purchase." Then he says: "The correct way of stating it is, not to say that a non-natural sense is given to the future words, but that the apparently future expression is read as having no reference to time at all, but as a mode of pointing out the stirps by way of description. Accordingly, it became settled law that *procreatis* and *procreandis* were equivalent expressions. *Doe* v. *Hallett* (4) is perhaps a stronger case than any other, because there was a special proviso in which the words 'hereafter to be born,' which point clearly to time, were employed,

(1) 8 L. T. (N.S.) 415; 1 H. & M. 630, 633.

(2) 2 Coll. 342.

(3) Cas. t. Tal. 31.

(4) 1 M. & S. 124.

and yet the Court held that the strict legal construction must prevail. In several of the authorities it is said (as it may be in every case) that you must look to the surrounding circumstances and the limitations of the will." Then he refers to the circumstances of *Early* v. *Benbow* (1), where "legacies of £600 each were given to certain named children of testator's brother *Henry*, and legacies of £500 each to named children of one of *Henry's* daughters. This was followed by a gift of £500 to each child 'that may be born' to either of the children of either of testator's brothers lawfully begotten. The named legatees did not exhaust the whole class of brother's grandchildren, and the Vice-Chancellor was of opinion that the testator, having made such provision for the named grandchildren, could not have intended to introduce the same persons again into the general class so as to give them double legacies." Then he adds: "I think very few minds would fail to follow the reasoning of that judgment; but the case before me is very different." He adds again: "Nothing is more mischievous than to depart from the settled legal meaning of words, unless there is something in the instrument which absolutely requires that you should do so." Then he goes on to discuss the terms of the instrument, and comes to the conclusion upon that will that there was nothing to require him to depart from the settled legal meaning of the words. It is to be observed that the Vice-Chancellor refers to *Doe* v. *Hallett* (2), and he does not express any dissent from the doctrine laid down by all the judges in that case, namely, that what we may call the primary legal meaning of the words "to be begotten" will not be adopted if there are indications of a contrary intention to be gathered from other parts of the testator's will. I have therefore in this case to look and see whether such circumstances are to be found, and in my opinion they are. In the first place, the Plaintiff's eldest son is passed by in the limitation of these estates. That is the same circumstance as occurred in the case in *Leonard*, and which is relied upon by Lord *Ellenborough* in the case of *Doe* v. *Hallett* as a strong circumstance tending to shew an intention to exclude altogether. He is not provided for at all by the will. It is stated that he is otherwise provided for, and the testator

(1) 2 Coll. 342. (2) 1 M. & S. 124.

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must be assumed to have considered him sufficiently provided for outside the will. Then, in the second place, the testator was aware of the state of his family; that he had only three sons. He nowhere uses the words "to be begotten" in a manner inconsistent with importing futurity, and in limiting the estates to the daughters, he uses the term "begotten or to be begotten." In dealing with his residuary personal estate, and the moneys to arise from the term of 500 years, he uses language with reference to his sons and daughters respectively such as to shew that unmistakably in dealing with his sons, he meant future sons, and did not intend to include existing sons. Therefore, looking at the will as a whole, I think there is enough, combined with the passing by of the son in the first instance, to justify me in coming to the conclusion that he meant to use the words "to be begotten" in a sense importing futurity. Then, last of all, if it is necessary—I do not think it is—I should say that the words "to be begotten" are capable of a primary legal and a secondary legal signification; that, if they are used in a secondary sense, we find a plain and intelligible disposition made by the testator, having regard to all the circumstances of the case; whereas, if I hold that he used them in a primary sense, then it becomes to a certain extent capricious, and unintelligible, as regards the provision made for the third and future fourth son. Therefore, upon the whole, after going through all the cases, it appears to me that I am justified in adhering to the construction which upon a simple perusal of the will I should have placed on it, and I hold the Plaintiff is not entitled, but that the persons claiming under the daughters are entitled, and consequently the action must be dismissed.

From this judgment the Plaintiff appealed.

The appeal was heard on the 24th and 25th of July, 1888.

Pearson, Q.C., and *Barber*, Q.C. (*Waggett* with them), for the Appellant:—

The Appellant claims under the words "every other son." There is nothing to exclude the ordinary grammatical meaning of the words. The words relied upon by the other side "to be

begotten," have been repeatedly held not to import futurity. From very early times *procreandi* and *procreati* have been construed as having the same meaning: Co. Litt. 20 b.; *Hewet* v. *Ireland* (1); *Doe* v. *Hallett* (2); *Almack* v. *Horn* (3); *Langston* v. *Langston* (4); *In re Blake* (5). There is nothing in the will to shew an intention that the eldest son was to be excluded in all events. It is true that he was otherwise provided for; but the other sons are also stated in the will to be otherwise provided for.

Hastings, Q.C., *Rigby*, Q.C., and *Vernon R. Smith*, for the Defendants, were not called on.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Stirling*, who held that the Appellant was not entitled to any estate in certain freehold estates devised by the testator. The Appellant says he is entitled to an estate tail in possession therein in priority to his sisters. The real question for our determination is whether he is entitled to any estate at all. The testator made his will in 1829, and thereby devised the said freehold estate to trustees to the use of his second son for life, with remainder, subject to a trust to preserve contingent remainders, to the use of the first, second, third, fourth, fifth and sixth, and all and every other the son and sons of his said second son as therein mentioned, and in default of such issue to the testator's third son for his life with similar remainders. Then comes the clause on which the Appellant relies—"And for default of such issue to the use of my fourth, fifth, and all and every other the son and sons of my body on the body of my said wife to be begotten, born, or *en ventre sa mère* at the time of my decease, severally, successively, and in remainder, one after another as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons and the heirs male of his body to be always preferred and to take before

(1) 1 P. Wms. 426.
(2) 1 M. & S. 124.
(3) 1 H. & M. 630.
(4) 8 Bli. (N.S.) 167; 2 Cl. & F. 194.
(5) 19 W. R. 765.

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the younger of such son and sons, and the heirs male of his and their body and bodies issuing," and for default of such issues to the use of his daughters. It was said that the words I have read "to be begotten," are to be disregarded, and that therefore this Plaintiff comes under the description of one of the "other sons of my body" and is entitled to take.

Now let us take the first point. Undoubtedly Mr. *Pearson* was right when he said that the general rule is this, that where there are the words "to be begotten," those words are not considered as excluding a child who has been born previously to the date of the instrument—the will or the settlement. That was first introduced where the gift to the person, or the limitation to the children, or issue, or heirs of the body was held to be a limitation to their parent. That was the first introduction of it. I think it has been said that that has been done in order to prevent difficulties as to descent. Perhaps it was. But that was a very clear thing. The Court said: "These words will give an estate tail, and we disregarded the words 'to be begotten,' or 'hereafter to be begotten,' because we think what was intended was simply to specify the estates to be taken, and to say whose child or whose heirs are pointed out"—what the stirps is from which these heirs or children are to come; and then, no doubt, it was afterwards extended to words of description where the testator or the settlor was describing the first devisee or legatee, or the first person who was to take under the gift, whatever it was. That probably was an extension, but not an unreasonable one. But that does not amount to a rule that these words, "to be begotten," can never be regarded. There is a general *primâ facie* rule that the words "to be begotten," the words as to futurity of birth, will not exclude one who would come within the description but for these words. In my opinion, however, it would be wrong to say that that is a rule which in the construction of words will not yield to circumstances. It is a rule which under ordinary circumstances will apply. But if there is in the will or other instrument sufficient to shew that those words ought not to be disregarded, then of course the Court will give effect to them, and will exclude children already born or issue already born. What we have got here is this—we have to consider what was the real intention of

the testator as expressed by his will. We ought to consider whether the testator has shewn that the first son is or is not excluded, and we ought to have regard to the words "to be begotten," even although those words by themselves would not be sufficient to exclude the eldest son.

Now what are the facts of this case? Of course in construing a will one must look at the facts which were known to the testator. The eldest son was otherwise provided for; he was, under some family settlement, entitled after the death of his father, who was tenant for life, to a life estate. Not only was that the fact, but the father in his will shews it was in his mind; he names his three sons, and says that *Francis* and *John*, who take life estates under this will, were otherwise provided for, and he says that the present Plaintiff was otherwise provided for. I think it was a little contended by Mr. *Barber*, though he did not press it, that he meant otherwise provided for by this will. In my opinion that is not so. If he had said "are otherwise provided for by this will," it would have been a most important matter for the Appellant, because that would lead to the conclusion that the testator thought he had made some provision for his eldest son by his will, and that provision could not be found, except in this clause on which the Appellant relies; but in my opinion that clause ought not to be so read. We know that the eldest son had another provision made for him, and we know that *Francis* the second son and *John* the third son were provided for in this will by having life interests given to them by name, and to their issue male, if they had any. That being so, how ought we to construe this? The testator first of all had given a life interest to *Francis*, whom he describes as his second son. Then there is remainder to his issue—to his first and other sons—giving them estates in tail male. Then if those failed and there were none, he gives a life estate to *John*, who is the third son, and a similar limitation to his first and other sons in tail male. Then there comes this clause which we have to construe, and on which we have to decide.

Now, in my opinion, the fact that the testator recognised his eldest son as having other provision made for him, points to the only way in which that limitation can reasonably be read. As a

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rule, a testator gives his eldest son the first life estate, and to his issue the first estate tail in remainder; but here the testator does not do that. He gives to the second son, *Francis*, and on failure of his issue male, he gives to the third son and his issue male; and then we come to the clause in question. I think that consideration is not immaterial in construing the words "other son," so as to fit in with the intention of the testator. Then we go on to the gift to the daughters. There, the testator puts it in terms, the daughters to be included are those "begotten" or "to be begotten." He shews there that the words "to be begotten" are emphatic. Whether the will was drawn by a lawyer, or whether he was his own draughtsman, we know not, but he is very particular to say it is to include not only those already "begotten," but those "to be begotten." Though I should not decide this question alone upon the use of the words "to be begotten" in this clause, they rather point to this, that the testator was using those words, "to be begotten" (although as a general rule they are not emphatic), as emphatic, and as shewing that what he intends is, by those words as a matter of description, to include only those who might thereafter be begotten. In my opinion, therefore, we cannot say that here he is not intending to express an intention that sons who are to take under this clause should be those afterwards begotten.

Then there is another point—which to my mind is rather a strong one. In the previous part of the will he did what settlors and testators usually do, he gave a life interest to his two sons and a tenancy in tail in their sons. But in this clause it is different. The fourth, fifth, and other sons hereafter to be begotten are made tenants in tail, and in my opinion the change in the limitation following the estates of the second and third sons and their issue is emphatic, and shews what the testator thought. He dealt with those sons who were then living, and whose names he knew, and made them tenants for life, and after their death the limitation is to their first and other sons; and then when he comes to the fourth and fifth and other sons, of whom he knew nothing, there he alters the limitations, and deals with them in the way I have mentioned. In my opinion, those facts really are sufficient to shew that, in construing the will, independently of any authorities

which would lead us to a different conclusion, Mr. Justice *Stirling* has arrived at a proper decision. Nor should it be forgotten that in these limitations to the fourth, fifth, and other sons, "to be begotten," the testator directs that they shall take according to seniority of birth. How extraordinary it would be, if he intended his first son to come in after the failure of the issue of the third, that he did not after the third put in his first son, saying, "in default of issue of the third son, I give a life interest to my first son, with remainder to his first and other sons in tail male." It all points to this, that he intended by the previous portion of the limitation to have provided for the sons who were living, and whom he knew of; and in the latter part of it not to provide for one of those who was living whom he knew, but to provide for any son who might thereafter be born, whose name he did not know or guess.

Several authorities were quoted, and one was very reasonably pressed upon us—the case in the House of Lords of *Langston* v. *Langston* (1). There, there were circumstances which led very strongly to the Court holding that, even on the mere construction of the will, the testator thought he had provided for the eldest son of the son whom he named, *James Haughton Langston*. That really was, I think, the ground of the decision. Lord *Brougham* had unfortunately looked at the draft of the will to see whether there was not some mistake in copying it; and, although he said he entirely disregarded it, yet one knows how one's mind is influenced by what is known, although it ought not to be known. Therefore, though he did that, as I think, very unfortunately, yet there was upon that will a sufficient indication that the testator thought that he had provided for the first son of *James Haughton Langston* by giving him an estate and interest in the property. It was curious there that he gave to *James Haughton Langston*, who was the son born and known, an estate for life. Although the will pointed to an intention by the form in which the limitations were made, he had not given any direct interest at all to his son's first son. Although there were trusts to preserve contingent remainders he goes on: "With remainder to the use of the second, third, fourth, and fifth and all and every

(1) 8 Bli. (N.S.) 167; 2 Cl. & F. 194.

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of the sons of the body of the same *James Haughton Langston* lawfully to be begotten severally and successively in remainder." There are several terms of years created for various purposes, raising various sums, and all those begin in this way: In case there should be no son of the said *James Haughton Langston* or future son of his, the said testator's, own body,—certain things were to be done. Now that points clearly to this view, that he thought he had provided in that clause for the first and every son of *James Haughton Langston*. But there was nothing to do so, unless there was an estate given to his first son under the words "And every other the son and sons of the body of the said *James Haughton Langston*." Accordingly the Court disregarded the words which there were "to be begotten," and disregarded the way in which the second, third, and fourth were placed; and it was held that the first son of *James Haughton Langston* was entitled to the estate. That, I think, explains that case.

Then there was another case referred to. It was a case in *Ireland*, which really is not binding upon us, although one has great regard for the Judges who decided it; but as it was cited we ought to deal with it. It is the case of *In re Blake* (1). It is a very curious case. A man married and a settlement was made on the marriage, and the limitations of the estates were for the husband and wife for life, and then afterwards for an estate in tail male to the first son of the body of *Charles Blake* on the body of his wife *Jane Patten* lawfully to be begotten. The second remainder was an estate tail to the second, third, fourth, and fifth, and all and every the son and sons of the said *Charles Blake*—not by that marriage only, but of any marriage. So that it was certainly a remarkable specimen of drawing. Then what happened was this, there was no issue of that marriage at all; but then the gentleman married again and he had two sons, and the contest was between the first son of the second marriage and the second son of the second marriage—that is to say, the first son of the father and the second son of the father. It was contended by the second son that the first son was not included, that the limitation was to the first son of *Charles Blake* and *Jane Patten*, and the first son was the first son of somebody else. There were two contests. One was whether

(1) 18 W. R. 916; 19 W. R. 765.

the first son took any estate at all, the other whether he took after and subsequent to his younger brother. The limitation was "to the use of the second, third, fourth, and of all and every the son and sons of the body of the said *Charles Blake* lawfully to be begotten, severally and successively, and in remainder one after the other as they and every of them shall be in seniority of age and priority of birth." The younger son said: "Yes, you may take after me, but I am the first." The Court would not regard that, but considered that they ought to give effect to the words "in seniority of age and priority of birth," and included the eldest son of the second marriage as taking with every other son. How was that? I think it was because there was a limitation over not to take effect (and this was pointed out by Chief Justice *Christian*) until there was a general failure of the issue of *Charles Blake*; that is to say, the first—the eldest son—although he was not in terms provided for unless he came under this clause, and every other son must be extinguished, his issue must come to an end, before the ultimate remainder would come in. It was perfectly clear that it was intended that the first son should take somewhere, and when you find he was entitled to take somewhere then you cannot say he is to take after the younger brother; as he is clearly to take, he must take according to the directions of the settlement—according to the priority of birth.

I think those cases therefore are distinguishable from this. If there was here a gift to the daughters on failure generally of all the issue male of the testator, the case would be very like indeed the last case. Although it was said that the testator had a scheme for postponing his daughters to all his issue male, yet as that was not carried out by the words, it depends upon what effect is to be given to this clause on which the Appellant relies. If the first son is not to take under this clause then no failure of issue is to take place before the daughters take.

Therefore I think Mr. Justice *Stirling* was right, and that the appeal fails.

FRY, L.J.:—

I am entirely of the same opinion. The circumstances of the testator were shortly these. He had a family of eight children,

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three sons and five daughters. A settlement was made apparently of property coming to him from his wife, or from his wife's father, under which the eldest son was entitled to what appears to be a considerable income, and further than that he had property of his own—unsettled property—upon which he appears to have resided. That estate he deals with in this way: he leaves it to his wife during widowhood; then he leaves it to his second son for life with remainder to his male issue in tail, and then he leaves it to his third son with remainder to his male issue in tail. Then, in other parts of the will, he notices the fact that his eldest son is already provided for, and he also mentions that he had these three sons, and these three sons only. Having dealt with the real estate in the way I have mentioned, he proceeds in these terms: "And for default of such issue to the use of my fourth, fifth, and all and every other the son and sons of my body on the body of my said wife to be begotten, born, or *en ventre sa mère* at the time of my decease, severally, successively, and in remainder one after another as they and every or them shall be in seniority of age and priority of birth."

Now, it appears to me, reading that will and considering all the circumstances of the testator, that the meaning of it (if we were untrammeled by decision) is as plain as anything can be. The testator does not intend to give anything to his eldest son but to the fourth, fifth and other sons, who are "to be begotten," or born, or to be *en ventre sa mère* at the time of the testator's death; with regard to all these children therefore, he looks to their coming into existence as a future event. That appears to be the plain meaning of the words, as I say, if we were not trammeled by decision.

But, undoubtedly we are to some extent trammeled by decision. Mr. *Pearson* was quite right when he said that on the words "to be begotten" there has been imposed by decision a distinct legal meaning. The ordinary primary legal meaning of those words includes children begotten in the past as well as "to be begotten" in the future. At the same time the law is not so strict as to say that that construction is to prevail against the evident mind and intent of the testator. The inquiry therefore is, do we or do we not find in this case indications by which

the Court is bound to be guided, to shew that he is using the words "to be begotten," not in their primary legal significance, but according to the ordinary meaning of the English language, as expressing futurity? In the present case I think we have indications which compel us to put upon these words the secondary legal meaning which is the primary popular meaning.

In the first place, be it observed, that they do not stand alone. They are coupled with the words, "born or *en ventre sa mère* at the time of my decease," words which are obviously indicative of a future event, and shew that futurity was in the contemplation and thoughts of the testator at the time he was writing. He was looking at the condition of things at the time of his own death. I wish to observe this, that the words, "born or *en ventre sa mère* at the time of my decease," are not words upon which a technical construction has been put, and therefore if we put a technical meaning upon the words "to be begotten," we find they are coupled with other words upon which no such technical meaning has been placed. But then we do not stop there, because when he goes on to deal with the interest of his daughters to whom he has, as yet, given nothing, he gives the estate amongst his daughters, who are described in this way, "All and every my daughter and daughters on the body of my said wife begotten or to be begotten, born, or *en ventre sa mère* at the time of my decease," repeating in the second part of the sentence the very words he had used with regard to the sons in the earlier part, but introducing the word "begotten" to shew that he meant to qualify by that the daughters of whom he was already the father. He was therefore drawing in the will a distinction between the past and future children. Now, that to my mind, is a very strong circumstance. But even then it does not quite rest there; because if we were to put the construction upon the words which has been contended for by the Appellant, it would result in this—that the eldest son would take an estate tail, that the second son would take an estate for life with remainder to his male issue in tail, that the third son would take an estate for life with remainder to his male issue in tail, and the fourth, fifth, and subsequent sons would take an estate in tail male. Now, although that is a perfectly possible disposition, it is one which is extremely

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unlikely, and extremely improbable. I have already pointed out that the testator has in his will indicated not merely the fact that the eldest son was provided for, but he has stated the fact that he had only three sons.

Now, putting all those circumstances together, I think that in this case we are compelled to put upon the words, "to be begotten" their primary meaning in the English language, and not the primary legal significance which is attached to them by decision.

The cases have been referred to by the Lord Justice, and I do not desire to add anything as to them, except to say this, that so far as I can see in all those cases the strict legal meaning of the words "other sons" has been ungrammatical, and therefore the legal meaning of the words "other sons" has been seized hold of by the Court to give effect to the manifest intention of the testator or settlor. If we were to adhere to the legal significance of the words "to be begotten," we should do so, not for the purpose of effectuating, but of defeating the manifest intention of the testator.

Therefore I think that Mr. Justice *Stirling* was right in the decision he came to, and that the grounds on which he arrived at that decision are correct.

LOPES, L.J.:—

I entirely agree, and I can add nothing to what has been said.

Solicitors: *Clarke, Rawlins & Co.*, agents for *E. D. B. Locke, Melksham; Lempriere & Browne.*

M. W.

In re NEW YORK EXCHANGE, LIMITED.

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KAY, J.
May 5.
C. A.
July 26, 27.

Winding-up—Compulsory Order—Voluntary Winding-up—Right of Creditor to Compulsory Order—Companies Act, 1862, *s.* 145 [*Revised Ed. Statutes, vol. xiv, p.* 234].

Sect. 145 of the *Companies Act*, 1862, which provides that the voluntary winding-up of a company shall be no bar to the right of a creditor to have it wound up by the Court if the Court is of opinion that his rights will be prejudiced by a voluntary winding-up, applies whether the voluntary winding-up commenced before or after the presentation of the petition.

A creditor presented a winding-up petition on the 17th of December, 1887. Three days before this the company had sent him an account shewing assets £2500, and liabilities £5000. On the 26th of January, 1888, the company passed an extraordinary resolution for winding-up. On the 28th of January the petition was ordered to stand over with liberty to the Petitioner to bring an action, which he did. On the 30th of April the voluntary liquidator withdrew his defence in the action on the ground that there were no assets. When the petition came on again, *Kay*, J., refused to make a winding-up order, but directed the voluntary winding-up to be continued under supervision. The petitioner appealed.

Held, on appeal, that this order must be affirmed, for that the only possible advantage of a compulsory order would be its relation back to the 17th of December, and that therefore the voluntary winding-up could not prejudice the rights of the creditor unless assets had been misapplied between the 17th of December, 1887, and the 26th of January, 1888, and that if the creditor relied on this, he ought to have made out at the hearing in the Court below a *primâ facie* case of misapplication of assets during that period.

THE company was incorporated in July, 1886, for the purpose of carrying on business as sharebrokers. The capital was £20,000 in 2000 shares, of which only 505 were allotted. On the 17th of December, 1887, *W. P. Millington* presented a petition for winding up the company, alleging that he had employed the company as his brokers to buy and sell stocks and shares for him, and that on the balance of account there was due to him from the company £1319 10*s.* 2*d.*, and that the company had sent him on the 14th of December, 1887, a statement of their assets and liabilities, shewing liabilities £5123 13*s.*, and assets £2611 5*s.* 2*d.*

The petition was answered for the 14th of January, 1888.

On the 6th of January, 1888, an order was made to appoint *A.*

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Morgan, the manager of the company, provisional official liquidator on his giving security.

On the 14th of January the petition came into the paper and was directed to stand over till the 21st and again till the 28th.

Morgan did not give security and left *England*. The Petitioner then applied for the appointment of another person as provisional liquidator. The company opposed the application, and it was ordered to stand over.

On the 26th of January, 1888, the company passed an extraordinary resolution for voluntary winding up, appointing *Mackay* liquidator.

On the 28th the petition came on to be heard. The company had filed affidavits impeaching the Petitioner's debt as founded on gambling transactions. Mr. Justice *Kay* directed the petition to stand over, with liberty to the Petitioner to bring an action.

The Petitioner accordingly brought his action and delivered statement of claim on the 3rd of February. The Defendants on the 18th delivered statement of defence, alleging that the debt claimed by the Petitioner was founded on gaming and wagering transactions. On the 22nd of February issue was joined.

On the 30th of April the solicitor of the liquidator wrote to the Petitioner's solicitor as follows:—

"Owing to the fact that after most careful search and investigation it has been ascertained that the company possess no assets for the payment of any of its debts, or even for the costs of liquidation, my client has instructed me to withdraw the company's defence to this action, and to schedule your client as a creditor for the amount of his claim. There is little doubt the company would succeed on its defence to this action if it were fought out—but it is obviously a waste of money to go to trial when there would be absolutely nothing for you to get even were you successful. On this point you have doubtless been able to satisfy yourself, as you have had the most unlimited inspection of all the company's books and papers. With reference to your petition, you may restore same or withdraw it as you think fit, but if you adopt the latter course my client would not under the circumstances make any application against you as to costs."

The defence having been withdrawn, judgment for the Plaintiff was given in the action on the 3rd of May. The petition was then restored to the paper and came on before Mr. Justice *Kay*, on the 5th of May.

G. H. Stutfield, and *H. Terrell*, for the Petitioner:—

The Petitioner, as between himself and the company, is entitled as of right to a compulsory order for the winding-up of the company: *In re West Hartlepool Ironworks Company* (1).

Marten, Q.C., and *Dauney*, for the company:—

We ask for a supervision order, which will be a sufficient protection to the Petitioner. In order to entitle himself to a compulsory order he is bound, under sect. 145 of the *Companies Act*, 1862, to shew that his rights will be prejudiced by the voluntary winding-up.

[KAY, J.:—A supervision order will not give him an independent liquidator.]

There is no suggestion that the present liquidator will not act properly and impartially. The case cited is an authority against, rather than in favour of the Petitioner, for in that case a supervision order was made.

Stutfield, in reply:—

Sect. 145 only applies to cases where a voluntary winding-up has been resolved upon before any winding-up petition has been presented; it does not extend to a case like the present where the petition has preceded the voluntary winding-up. It would be establishing a dangerous precedent if it were held that after a winding-up petition has been presented by a creditor, the company can defeat his right to a compulsory order by passing a resolution for a voluntary winding-up.

KAY, J.:—

The duty of the Court in all these cases is to act judicially—to look at all the facts, and to see what really is for the benefit

(1) Law Rep. 10 Ch. 618.

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of the creditors. They are the body whose interests I regard, and I do not at all consider the interests of any one else. What I have here is this. This creditor presented a petition for the winding-up of the company, which it was within his right to do. His debt was disputed, and an action was brought by him against the company in order to determine whether he was entitled to the sum which he claimed. Shortly after the petition was presented, a resolution was passed by the company for a voluntary winding-up, and a liquidator was appointed—a gentleman against whom not a single word has been said. I must assume that he is a proper and honourable person, and that he will do his duty in the best manner he can. The only thing that can be urged against him is that he is the nominee of the directors, but he is not a person who is in any way interested in the company, and, no suggestion having been made of any impropriety in his appointment, I must assume that he has been properly appointed. This liquidator, in the exercise of his discretion, has not thought fit to resist the action by the Petitioner, judgment has been obtained against the company, and the debt is now established as between the Petitioner and the company. There is now brought before me a statement which shews the assets and liabilities of the company. [His Lordship referred to the statement in detail, and continued:—] The result is, that there is a deficiency of assets to pay the liabilities of £2028, and one of the debts due to the company—the largest, amounting to £484—being doubtful, the deficiency, if that debt is not recovered, will be £2512. There is no suggestion before me that the voluntary liquidator will not do his duty perfectly well, and that duty is simply to get in these assets as well as he can, and divide them rateably among the creditors. The section of the *Companies Act*, 1862, which refers to such a case as this is sect. 145. [His Lordship read the section, and continued:—] It is said that that section applies *primâ facie* to the case of a voluntary winding-up resolved upon before a winding-up petition has been presented. It may, no doubt, be so. I am told that the Court has no discretion in such a case as the present. It is said that there is some decision which binds the Court hard and fast, so that, whatever the state of the assets may be, and

whatever the result to the Petitioner himself may be, the Court must, under such circumstances as exist here, make a compulsory order. I do not understand that to be the law; if it were, it would be an extremely foolish law. If it appears, as it does appear to me, to be probable, that if I now, without any further reason, were to make a compulsory order, and appoint an official liquidator, extra costs would be occasioned which would seriously diminish, if not destroy, the small balance left for the creditors, I cannot understand that a petitioner, in the position of this Petitioner, can be acting in good faith when he asks for a compulsory order. I can quite understand that his professional adviser may desire to have the carriage of such an order, but the object of the Court in making the order is not to diminish the assets more than can be helped; and I think the Petitioner's interests will be best considered by my exercising the discretion which I think the Court has, and saying that it is for the benefit of the creditors that a compulsory order should not be made. In the case of such a wretchedly small affair as this, I think I ought to take any course I can to prevent cost which is not positively necessary from being incurred, and therefore, not to make a compulsory order, which must occasion extra expense, but to make a supervision order. Under that order the Petitioner, or anybody else, at his own risk as to costs, which in my judgment is a most salutary check, can obtain any order which it is right to make in reference to the winding-up. If the liquidator does not do his duty, the matter may be brought before the Court by summons, and he may be removed. If any division of assets is not properly made the Petitioner may bring that matter too before the Court, but always at his own risk as to costs. Accordingly I make the usual supervision order.

C. C. M. D.

The usual order for supervision was accordingly made—any proceedings under the voluntary winding-up to be adopted as the Judge should direct.

On the 10th of May the liquidator gave to the Petitioner an account of his receipts and payments. The former amounted to £75 3*s.* 3*d.*, the latter to £22 9*s.* 1*d.* He stated that the com-

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pany had also a balance at its bankers of £192 7*s.* 7*d.*, which had been appropriated by the bank towards payment of a dishonoured acceptance indorsed by the company.

The Petitioner appealed, and gave notice that on the hearing of the appeal he should ask leave to adduce further evidence as to material facts connected with the voluntary winding-up of the company, and the reasons why it would be detrimental to the interests of the creditors that the voluntary winding-up should be continued. The Court of Appeal declined to allow this evidence to be read, saying that it was the duty of the Petitioner to bring forward his whole case at once, and not to bring it forward piecemeal as he found out the objections in his way.

C. A. The appeal was heard on the 26th and 27th of July, 1888.

H. Terrell, for the Appellant:—

A creditor whose debt is undisputed, which ours now is, is entitled *ex debito justitiæ* to a winding-up order.

[FRY, L.J.:—Yes, if there is no winding-up going on, but looking at sect. 145 of the *Companies Act*, 1862, does not the existence of a voluntary winding-up alter the case?]

It is submitted that the section only applies to a voluntary winding-up which had come into operation before the creditors' petition was presented—his rights must be determined at the time of the presentation. The only authority for refusing him a winding-up order is *In re West Hartlepool Ironworks Company* (1), where it was refused on the ground that a great majority of the creditors opposed it.

[COTTON, L.J.:—May not the Court refuse the order where it would be useless because there are no assets?]

We do not dispute that it may, but we dispute the fact of there being no assets. Just before our petition was presented the company gave us an account shewing assets, and we want to know how they have been dealt with.

Marten, Q.C., and *Dauney*, for the liquidator:—

The Judge in the first instance thought that as the Petitioner's

(1) Law Rep. 10 Ch. 618.

debt was doubtful, a case for a winding-up order was not established: he therefore gave the Petitioner leave to bring an action. The liquidator considered that he had a good defence, but gave it up because there were no assets.

[FRY, L.J.:—A compulsory winding-up would overreach payments made since the presentation of the petition. An account was given just before, which shewed assets—then an account is given shewing none. Ought there not to be an opportunity of investigating the payments in the interval?]

The Judge considered that the case was one for the discretion of the Court, that here the assets were originally very small, that there was no ground for suspecting that the liquidator was not doing his duty, that under sect. 145 the petitioner must shew that the continuance of the voluntary winding-up would prejudice him, that this was not made out, and that therefore a supervision order was the proper one.

Stewart Smith, for the secretary and the auditor of the company, who were creditors for sums amounting to about £600, stated that his clients opposed the petition.

H. Terrell, in reply:—

If there are now no assets they must have disappeared between the 14th of December, 1887, and the 26th of January, 1888. If they disappeared before the 17th of December a compulsory order would not help me; but if a large part of them was paid away during the period between the 17th of December and the 26th of January, which is most probable, the payments could be investigated under such an order. I therefore am prejudiced by the continuance of the voluntary winding-up.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kay*, who has refused to make a compulsory winding-up order, and has continued a voluntary winding-up under the supervision of the Court. The appeal was rested on the ground that a creditor has *ex debito justitiæ* a right to a winding-up order. As a general rule he has, but that general rule is subject to exceptions; generally

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it is his only effectual means of obtaining payment from the company, and where that is the case, he is of right entitled to it. But the Court ought not to make a winding-up order if it is satisfied that such an order will do no good. On the 17th of December last the petition was presented, and on the 28th of January it was ordered to stand over with liberty to the Petitioner to bring an action, the company having disputed the debt as founded upon wagering transactions. In the meantime, on the 26th of January, the company had passed a resolution for a voluntary winding-up. On the 30th of April the liquidator withdrew the defence to the action, on the ground that the company had no assets. In December, 1887, an account had been given to the Petitioner which shewed that the company had then assets amounting to between £2000 and £3000, and that its liabilities were about double that amount. The liquidator now says that the company has no assets. The Petitioner contends that the assets must have been made away with in the interval, and that it is important to him to be able to call in question the payments made between the presentation of the petition and the date of the resolution for voluntary winding-up. Whatever has been done since the commencement of the voluntary winding-up can be investigated by the Court; but it is true that there may have been payments made in the interval between the presentation of the petition and the resolution for winding up, which cannot be investigated under the voluntary winding-up. For this reason we heard counsel for the liquidator. On consideration, I think that if any case of the assets having been improperly dealt with during this interval was to be made, it ought to have been brought forward at the hearing of the petition. The Court will not make a compulsory order when a voluntary winding up is pending, unless it is satisfied that the creditor will be prejudiced by the continuance of the voluntary winding-up, and this the Petitioner must be taken to have known. He therefore ought to have made a case shewing that having the winding-up carried back to the 17th of January would be an advantage to him, for it is only by his losing that advantage that he can be prejudiced by the continuance of the voluntary winding-up. In no other respect could he be benefited by a compulsory winding-up

order, since the Court has the same powers under a supervision order as under a compulsory winding-up order.

It was urged that the 145th section of the *Companies Act*, 1862, only applies where the voluntary winding-up has commenced before the presentation of the petition, but no authority was cited in support of this contention, and I do not think it well founded. I think that the Legislature intended the Court not to supersede a voluntary winding-up unless satisfied that the creditor would be prejudiced by continuing it. If he can make out a probable case of the assets having been improperly dealt with, he shews that he is prejudiced, and is then entitled to a compulsory order, but I do not think that the mere fact that the investigation could be carried further back under a compulsory order is enough to entitle him to it, when he lays no ground for supposing that carrying it back would be a benefit to him. The appeal, therefore, in my opinion, fails.

FRY, L.J.:—

I am of the same opinion. Section 145 provides that the voluntary winding-up of a company is not to bar the right of a creditor to have the same wound up by the Court if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding-up. The Appellant urged that this enactment does not make a voluntary winding-up a bar, unless it was in force at the time when the petition was presented; but I see no ground for thus confining the words of the section. I think it lies on the creditor to shew that the continuance of a voluntary winding-up which is proceeding when he asks for a compulsory order will prejudice him. Are we satisfied that he will be prejudiced? There is no direct evidence that he will, and I, for my part am not satisfied. If he meant to rely on improper dealing with the assets in the interval between the presentation of the petition and the resolution to wind up, he should have brought forward at the hearing below a case of such improper dealing.

The Petitioner is a creditor—no other creditor appears to support him, and two creditors appear to object. By sect. 91, the Court may have regard to the wishes of creditors. It was said that these objecting creditors are not *bonâ fide* creditors; but I

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see no reason for saying that they are not as much so as the Petitioner.

LOPES, L.J.:—

It lies on the Petitioner to shew that he will be prejudiced by the continuance of the voluntary winding-up, and in my opinion he has not done so.

Solicitor for Petitioner: *J. A. Neale.*

Solicitor for Liquidator: *George Terrell.*

Solicitors for Opposing Creditors: *Worthington Evans & Blaxland.*

H. C. J.

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In re JELLARD.

Practice—Service out of Jurisdiction—Petition under Trustee Relief Act for Payment of Money out of Court—Rules of Supreme Court, 1883, *Order* XI., *r.* 1.

Held, by *North*, J., that the Court has no jurisdiction to allow service out of the jurisdiction of a petition under the *Trustee Relief Act* for payment of money out of Court.

In re Gordon's Settlement Trusts (1) not followed.

It appearing that the order sought by the petition was only for carrying into full effect an order which had recently been obtained by the Respondents, the Court of Appeal, without deciding that leave was necessary, gave leave to serve the petition on the solicitors who had presented the former petition, and who were willing to accept service.

THIS was an *ex parte* application for leave to serve a petition under the *Trustee Relief Act* for payment of money out of Court upon Respondents out of the jurisdiction.

Sargant, for the Petitioner:—

There is power to allow service out of the jurisdiction of such a petition: *In re Busfield* (2) (observation of Lord Justice *Cotton* (3)); *In re Gordon's Settlement Trusts.*

(1) W. N. 1887, p. 192. (2) 32 Ch. D. 123.
(3) 32 Ch. D. 129.

NORTH, J. :—

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I do not see that I have power to allow service out of the jurisdiction of anything but a writ of summons, or notice of a writ of summons. If you choose you can give notice to the Respondents who are out of the jurisdiction, but I cannot fortify the notice by giving leave to serve it. I decline to act upon *In re Gordon's Settlement Trusts* (1).

W. L. C.

C. A.

1888. Aug. 1. The application was renewed before the Court of Appeal.

It appeared that the funds in Court belonged to *J. P. Jellard*, the elder, for life, with remainder to his three children, of whom *J. P. Jellard*, jun., was one, in equal shares. By an order made on the 18th of February, 1888, on the petition of *J. P. Jellard*, sen., and his children, the third shares of the children had been carried over each to the separate account of the child and his or her incumbrancers, subject to the life interest of *J. P. Jellard*, sen. *Taylor*, the present Petitioner, had purchased the interests of *J. P. Jellard*, sen., and *J. P. Jellard*, jun., under a power of sale in a mortgage, and now petitioned for a transfer to him of the third share of *J. P. Jellard*, jun., and payment of the dividends on the other two-thirds. The *Jellards* were in *Australia*.

Sargant, for the application.

COTTON, L.J., asked whether substituted service on the solicitors who presented the petition of February had been suggested to the Judge, and was informed that it had not, but that the solicitors were willing to accept service.

COTTON, L.J. :—

It is not sought by the present petition to originate any jurisdiction against the *Jellards*; they have submitted to the jurisdiction by their own petition, and the present petition only seeks to give full effect to an order which they themselves obtained. I think that service on the solicitors whose names

(1) W. N. 1887, p. 192.

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appear on the record will be sufficient, as the service is not to originate jurisdiction, but only to give notice to the parties that it is proposed to deal with the fund. We do not decide that it is necessary that leave should be given to serve the solicitors, but to prevent all difficulty we give leave.

FRY and LOPES, L.JJ., concurred.

Solicitors: *St. Barbe Sladen & Wing.*

H. C. J..

C. A. 1888 *July* 31; *Aug.* 2, 4.

In re HAMLET. STEPHEN *v.* CUNNINGHAM.

[1888 H. 392.]

Will—Construction—Gift over—Portions—Children dying in Lifetime of Parent.

The rule in *Howgrave* v. *Cartier* (1) in favour of putting on a settlement or will making a provision for a family such a construction as will give the children indefeasible interests on their attaining twenty-one, is only a rule of construction to be applied in construing ambiguous words, and not a positive rule which will modify the effect of plain words.

A testator gave his property to his daughter for life, and then to her children, who being sons should attain twenty-one, or being daughters attain that age or marry. "And in case my said daughter shall happen to die without leaving any child or children her surviving, or leaving such they shall all die without having obtained a vested interest in the said trust-moneys, and without leaving any issue them, him or her surviving," then over to two cousins. The daughter had children, some of whom attained twenty-one, but all died in her lifetime:—

Held, that the gift over took effect, its terms being unambiguous and the event to which it referred having happened.

Decision of *Kay*, J., affirmed.

THIS was an appeal by the Defendant, *J. W. Cunningham*, from a decision of Mr. Justice *Kay* (2).

John Hamlet, by will dated the 23rd of May, 1825, gave his real estate to *William Bennett* and *Sarah Goodwin*, their heirs and assigns, upon the trusts thereinafter mentioned; and bequeathed

(1) 3 V. & B. 79. (2) 38 Ch. D. 183.

his personal estate to the same trustees, their executors, administrators, and assigns, upon the trusts thereinafter mentioned. The trusts were that the trustees and the survivors of them, and the heirs, executors, administrators and assigns of the survivor should sell and convert into money his personal estate, or such part thereof as should not consist of money, and should, in case they should think proper and advisable, sell the real estate. He directed his trustees to stand possessed of all sums of money which should come to their hands by the above ways and means, upon trust to pay his debts, funeral and testamentary expenses, and invest the surplus in manner therein mentioned, and after his daughter *Elizabeth Ann Hamlet* attained twenty-one, to pay the income to her during her life for her separate use, with a restraint on anticipation, and after her decease, as to both the capital and income of the trust funds, "In trust to pay, and I do hereby give and bequeath the same unto all and every the children and child of her my said daughter *Elizabeth Ann* who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, to be divided between or amongst them, if more than one, in equal shares and proportions, with benefit of survivorship between and amongst them in case any or either of them shall happen to die without having obtained a vested interest therein, and if but one the whole to that one child; and in case my said daughter *Elizabeth Ann* shall happen to die without leaving any child or children her surviving, or leaving such they shall all die without having obtained a vested interest in the said trust-moneys, and without leaving any issue them, him or her surviving, then I hereby give and bequeath the said trust-moneys, stocks, funds and securities, and the dividends, interest, and annual produce thereof unto and equally between my cousins the said *William Bennett* and *Sarah Goodwin*, their executors, administrators and assigns, for their own use and benefit absolutely." The testator then directed that until the income of the trust fund should "become payable under the trusts of this my will," the trustees should invest and accumulate it. And he declared that "until the vesting or payment of the portions hereby provided for the children of my said daughter *Elizabeth Ann* respectively, as aforesaid," the trustees

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or trustee should raise and pay such sums as they, he, or she should think proper for the maintenance and education of the children of his said daughter respectively, and also should, after her decease advance any sums of money they or he should think proper out of the trust funds for the advancement of any of his grandsons during his, her or their minority or respective minorities, the money so paid for advancement to be "taken as part of the portion or portions, share or shares to which they, my said grandsons, will respectively become entitled under this my will." He then directed that the rents, issues and profits of his real estate until sale should be applied in the manner in which the income of the proceeds of sale was thereinbefore directed to be applied, and he declared that if his trustees should not think proper to sell his real estate, then as to such parts thereof as should not be sold, "I do hereby give and devise the same, and every part thereof (after the decease of my said daughter *Elizabeth Ann*) unto and equally between all and every the children and child of her my said daughter *Elizabeth Ann*, their heirs and assigns for ever, as tenants in common and not as joint tenants, and in case my said daughter shall depart this life without leaving any issue her surviving, then as to my real estates, or such part or parts thereof as shall not be sold or disposed of under the trusts of this my will, I give and devise the same and every part thereof unto and equally between the said *William Bennett* and *Sarah Goodwin*, their heirs and assigns for ever, to take as tenants in common and not as joint tenants."

The testator died in 1825, leaving no child except the daughter named in his will, who was then under age and unmarried. In 1840 she married *John William Cunningham*, by whom she had six children, all of whom died unmarried in her lifetime, but two of them having attained the age of twenty-one years. She died in January 1881. Under the wills of the two children who attained twenty-one, *John William Cunningham* was entitled to such shares, if any, as they were able to dispose of in *John Hamlet's* property, subject to a mortgage which one of them had made, and which was vested in *H. S. Cunningham*. Part of the real estate remained unsold.

The trustees took out an originating summons to have the

construction of the will settled. Mr. Justice *Kay* decided that the gift over to *William Bennett* and *Sarah Goodwin* had taken effect (1). *John William Cunningham* appealed, and the appeal was argued on the 31st of July and the 2nd of August.

Sir *Horace Davey*, Q.C., and *Vaughan Hawkins*, for the Appellant:—

The two children who attained twenty-one took indefeasible interests, and the gift over did not take effect. The gift over is to be construed as a remainder, which was only to take effect on the complete failure of the original gift. If a gift can be construed as a remainder, the Court will always adopt that construction, rather than defeat a vested interest. The words "leaving a child or children" ought to be construed "having had a child or children" according to the established principle of construction in case of settlements: *Emperor* v. *Rolfe* (2). The same construction is applicable in wills where the testator has placed himself *in loco parentis* to the class of children to be benefited: *Woodcock* v. *Duke of Dorset* (3); *Farrer* v. *Barker* (4); *Jackson* v. *Dover* (5); *Howgrave* v. *Cartier* (6); *Bouverie* v. *Bouverie* (7). In the present case the testator is providing for the children of his only daughter, and he calls their shares "portions." The word "surviving" has been held not to interfere with this construction: *Currie* v. *Larkins* (8). In some cases that word has been said to refer to the surviving of the *stirps*, but it would be more correct to say that it refers to the surviving of the share. Whenever the share vests, so that it either survives in the legatee or is transmitted to his representatives, it may be said to "survive." In such cases the gift over does not affect it: *Waite* v. *Littlewood* (9); *Lucena* v. *Lucena* (10).

If the word "surviving" is to have its literal meaning, the gift over ought to be construed as referring to children who might be infants at the death of their mother. The testator is dealing with the event of no children attaining a vested interest,

(1) 38 Ch. D. 183.
(2) 1 Ves. Sen. 208.
(3) 3 Bro. C. C. 569.
(4) 9 Hare, 737.
(5) 2 H. & M. 209.
(6) 3 V. & B. 79.
(7) 2 Ph. 349.
(8) 4 D. J. & S. 245.
(9) Law Rep. 8 Ch. 70.
(10) 7 Ch. D. 255.

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and he takes two alternatives; (1) if no infant child should survive the tenant for life; (2) if she should leave infant children who should not attain twenty-one. In any construction there is an ambiguity and an apparent inconsistency with the original gift, and in such a case the Court always adopts such a construction as will best convey into effect the intention of the testator: *Perfect* v. *Lord Curzon* (1): *Wakefield* v. *Maffet* (2); *Kennedy* v. *Sedgwick* (3); *Maitland* v. *Chalie* (4); *In re Thompson's Trust* (5); *Currie* v. *Larkins* (6); *Swallow* v. *Binns* (7).

Marten, Q.C., and *E. Beaumont*, for the representative of *Sarah Goodwin*:—

The gift over in this case took effect in the events that have happened. There is no ambiguity in the words of this will. The clear intention of the testator was that the shares should vest in the legatee on attaining twenty-one, or on the death of the mother, whichever event should last happen. The form of the gift, "in trust to pay," confirms this construction; and no other construction makes the whole will consistent. In any other construction the clause of survivorship which precedes the gift over would be superfluous and meaningless.

The artificial rule of construction adopted in *Emperor* v. *Rolfe* (8), and followed in subsequent cases, is only applicable in cases of doubtful construction upon the whole instrument, when it has been carried to the full length that is justifiable in order to prevent the divesting of an interest which by previous words of gift was vested in a child; "but no case has gone so far as to do violence to the words, if no other part of the instrument be found inconsistent with them": *Whatford* v. *Moore* (9); *Jeyes* v. *Savage* (10).

Torres v. *Franco* (11) and *Swallow* v. *Binns* were both cases of settlement in which, there being conflicting or doubtful clauses, the Court held that the presumed intention of the instrument

(1) 5 Madd. 442.
(2) 10 App. Cas. 422.
(3) 3 K. & J. 540.
(4) 6 Madd. 243.
(5) 5 De G. & Sm. 667.
(6) 4 D. J. & S. 245.
(7) 1 K. & J. 417.
(8) 1 Ves. Sen. 208.
(9) 3 My. & Cr. 270, 289.
(10) Law Rep. 10 Ch. 555.
(11) 1 Russ. & My. 649.

per se to provide for children must prevail, so as to give a vested interest to children who had attained twenty-one, though they did not survive the first taker.

[COTTON, L.J., referred to *In re Thompson's Trusts* (1), where the words "leave no child or children, &c., &c.," were held not to take away the effect of a prior clearly vested interest.]

Bramwell Davis, for the representatives of *William Bennett*:—

Where, as in this case, the will contains a clear and unambiguous divesting clause, the Court cannot make a new will for the sake of giving effect to what may have been supposed to be the paramount intention: *Bythesea* v. *Bythesea* (2); *In re Willmott's Trusts* (3).

The nearest case to this is *Young* v. *Turner* (4), where the Court declined to substitute, as is here sought to be done, the word "having" issue for the word "leaving" issue. *White* v. *Hill* (5) is distinguished from that case. The opinion of Lord *Cottenham*, in *Whatford* v. *Moore* (6), that the cases in favour of vesting had been carried to their full extent, was fully supported by Sir *G. Turner* in *Farrer* v. *Barker* (7). There is nothing to shew that the testator in this case placed himself *in loco parentis* to the possible children of his daughter, who was not even married at the time of his death.

Sir *Horace Davey*, in reply:—

It has been attempted on behalf of the Respondents to whittle away to nothing the rule of construction which has been adopted in order to carry out the presumed intentions, and prevent a clear primary gift from being divested. Where there is an inconsistency between the original gift and the gift over, the Court will lean to such a construction as will let in the largest number of the original objects of gift: *Perfect* v. *Lord Curzon* (8); *Torres* v. *Franco* (9). And this rule is not confined to settlements, but

(1) 5 De G. & Sm. 667.
(2) 23 L. J. (Ch.) 1004; 17 Jur. 645.
(3) Law Rep. 7 Eq. 532.
(4) 1 B. & S. 550.
(5) Law Rep. 4 Eq. 265.
(6) 3 My. & Cr. 289.
(7) 9 Hare, 737, 744.
(8) 5 Madd. 442.
(9) 1 Russ. & My. 649.

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extends to wills also: *Jackson* v. *Dover* (1); *In re Knowles* (2). If the gift over is fairly capable of being construed in two ways, and one construction will be consistent with the maintenance of the vested interests which have been clearly given in the first instance, the Court will struggle to adopt that construction, though it may not be the most obvious or literal: *Currie* v. *Larkins* (3); *Powis* v. *Burdett* (4).

1888. Aug. 4. COTTON, L.J.:—

This is an appeal against the decision of Mr. Justice *Kay*, who declared that on the true construction of the will of the testator a gift over took effect, and that the representatives of the children of the testator's daughter did not take the property given primarily to the children. The facts are, that the testator by his will gave a life interest in his property to his daughter, and then gave the property to all her children who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and if more than one in equal shares, and if but one, the whole to that one child. Then follows the gift over upon which the question before us turns: "And in case my said daughter *Elizabeth Ann* shall happen to die without leaving any child or children her surviving, or leaving such they shall all die without having obtained a vested interest in the said trust moneys, and without leaving any issue them, him, or her surviving, then I hereby give and bequeath the said trust moneys, stocks, funds, and securities, and the dividends, interest, and annual produce thereof, unto and equally between my two cousins *William Bennett* and *Sarah Goodwin*, their executors and assigns." The daughter was under age and unmarried at the testator's death. She afterwards married, and had several children, two of whom attained twenty-one, and so acquired a vested interest; but all the children died before their mother. It is contended on behalf of the Appellant that that clause, notwithstanding its terms, does not in the events which have happened carry over the property to the two cousins. In support of his contention, he refers to a rule which is a

(1) 2 H. & M. 209.
(2) 21 Ch. D. 806.
(3) 4 D. J. & S. 245, 255.
(4) 9 Ves. 428.

well-known rule, though I differ somewhat from Sir *Horace Davey* and Mr. *Vaughan Hawkins* in the way in which they seek to state it. It is a rule which is not laid down for the first time, but is referred to and approved of, in *Howgrave* v. *Cartier* (1), by Sir *William Grant* in these terms (2): "Is it then possible to say, that from the whole of this instrument a clear, definite, and unambiguous intention is to be collected to exclude all children, except those, not only attaining twenty-one, but surviving both parents? So far from that it is left extremely doubtful, whether it was intended so to frame the settlement. Certainly they have not so framed it: but I think they have not even said enough to arise an inference of such an intention. Then the Court is left at liberty to construe it (for construction it certainly requires) in the way, that has been held the most rational in the case of ambiguous family settlements, that all children, arriving at the age of twenty-one are entitled." When we look back to the report at pages 89 and 91, we find that the whole difficulty there was caused by the use of the words "such children," and that is the matter to which Sir *William Grant* is referring. What he there expresses (and I think correctly) the rule to be is this, that where there is provision made for children, either in a settlement or (as it was afterwards held) in a will, if the construction is ambiguous the testator should not be held to exclude children who have attained twenty-one or married, simply because they die in the lifetime of their parent; but that rule is only to be applied as a guide in construing an expression which is in itself ambiguous, or which the Court sees not to be framed in accordance with the intention of the settlor or testator as shewn by the other parts of the instrument. Mr. Justice *Kay*, I think, decided the present case on the ground that the rule would not apply to it, because he considered that the testator was not *in loco parentis* towards his grandchildren. I do not take that view. If the rule had been one that prevented the Court from fairly construing the instrument, it might well be that its operation would be confined to the case of a settlement made by a person *in loco parentis*, and would not be extended to the case of a will. But I do not so understand the rule. I understand it to be that, when you find

(1) 3 V. & B. 79, 91. (2) 3 V. & B. 91.

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provision made for children (and grandchildren would come within the same principle), if the expressions are ambiguous, you will give to the instrument, if you can, that construction which will carry into effect in the best way the intention of the settlor or testator to provide either for his children or grandchildren. I do not think it is necessary to go into the question whether the testator here could be considered to stand *in loco parentis* to his grandchildren; for, assuming that the rule applies, I still think that the decision of Mr. Justice *Kay* is right. The rule is only a rule of construction, to guide us when there is ambiguity in the words of the instrument, and I cannot see what ambiguity there is in this will. The words, "In case my said daughter *Elizabeth Ann* shall happen to die without leaving any child or children her surviving," are as plain an expression as a testator can well use.

But then it was contended, principally, I think, by Mr. *Vaughan Hawkins*, that there is an inconsistency in this gift over. It is inconsistent with such a will as we should wish to see. But if a testator or settlor chooses, within the limits allowed by law, to defeat a vested interest already given, there is no legal inconsistency in that. It is true that this gift over is not reasonable, using "reasonable" in the sense of what one would advise a testator to be proper to put into his will, but testators can act according to their own will and according to their own desire, and in my opinion we cannot, if there be no ambiguity in the instrument, give effect to the rule of construction in *Howgrave* v. *Cartier* (1), and to the presumed intention of settlors or testators providing for children or grandchildren. If a testator makes in clear terms an unreasonable disposition we cannot help it, and we cannot make a will for him. All rules of construction are simply rules to be applied where there is no definite expression of intention in the instrument. If there is, you do not want any rule of construction. Even when it has been laid down as a rule that certain words have a particular meaning, still, if there is any expression in the will which shews that the testator intended to use them in a different sense, we must give them the meaning which he has shewn that he intended them to bear. Rules of construction are only intended

(1) 3 V. & B. 79.

to aid us where there is ambiguity, and not to enable us to get rid of the express words of the testator if expressed in clear language. This view is supported by the observations of Lord *Halsbury* in *Leader* v. *Duffey* (1), where he said that it was the duty of the Court to construe the words of the instrument with such help as could be obtained from the instrument, and not to look at rules of construction as positive rules to which effect must be given even where the testator has expressed a different intention. The argument which has appeared to me to deserve most consideration is that these words were to be considered as a mere continuation of the limitation which was to take effect if no vested interest was obtained by the children under the preceding words. Both the counsel for the Appellant relied on the words of the introduction, "And in case my said daughter." . . . They said that those were not words which would be naturally used if the testator was defeating a previously vested interest. But I am struck with this, that in the latter part of the will, where the testator disposes of the unsold part of his real estate, he first gives it to the children by words which clearly would give them vested interests on their births, and then introduces a gift over by the same words as those we are now considering. I do not much rely upon that clause as shewing us what his intention was, but only as shewing us that he used the words "And in case" to introduce a limitation displacing a previous vested gift, a limitation which clearly was intended to displace a previous vested interest, and which could not be contended to be merely carrying out a series of limitations to take effect on failure of the previous objects of the gift.

Sir *Horace Davey* tried to put this limitation over into different words, making what he said would be a slight and reasonable alteration of the language, so as to make it a mere provision in the event of the failure of the previous gift. But I was struck with the difficulty that even Sir *Horace Davey* had of putting the gift over into language which would give effect to his suggestion. The only way in which he could render it was, "If my daughter shall die without leaving any child other than a child who has attained a vested interest." But that will not do at all. A less

(1) 13 App. Cas. 294.

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violent alteration would be to read "And in case all the children of my said daughter should die in the lifetime of their mother," which perhaps might be rightly construed as meaning "in case all her children should die without having attained a vested interest," because it is immediately preceded by a limitation on the death of some of them without having obtained a vested interest. After saying what was to be done if some of them died without obtaining a vested interest, it would be natural to go on to say what was to take place if all died without obtaining it, and if the will had been expressed as I have suggested, I think that it might not unreasonably have been read as meaning if all the children died without having attained twenty-one or without having attained twenty-one or married. But that is not the language which the testator has used, and although what is contended for by the Appellant would fit in with what we should consider the more reasonable view for a testator to take, we can only judge of his intention by the language he has used.

Many cases were referred to and some were pressed upon us. I do not intend to go through them all, because to my mind we have only to consider whether there is ambiguity, and, if there is, then lean to that construction of the ambiguous words which will best give effect to what may be presumed to have been the intention of the testator. *Currie* v. *Larkins* (1) was much relied on. That was a case before Lord Justice *Knight Bruce* and Lord Justice *Turner*, and Sir *Horace Davey* said it was more difficult to arrive at the construction there adopted than to arrive at a conclusion in his favour here. I do not agree with that view. The question there was whether the property vested only in those children who not only attained twenty-one or married but also survived their mother. What the Lord Justices held was this, that on the construction of the settlement the words referring to survivorship were only intended to shew that the children were not to interfere with the life interests given to the parents, that they were to take nothing until after the death of the survivor of the parents—that those words were not inserted in order to define the children who were to take, but merely to shew when they were to have the enjoyment in possession. Lord Justice *Turner*

(1) 4 D. J. & S. 245.

says (1): "It seems to me that this is a most unreasonable and unnatural construction to give to these words," (*i.e.* a construction excluding the children who happened to die during the lifetime of the parents) "and we must, therefore, see whether some other construction cannot be given to the words, 'after the decease of the survivor of the said *Harry Meggs Graves* and *Louisa Seton Larkins*;' and I agree with my learned Brother, that the true meaning of these words upon the whole settlement must be, that, notwithstanding the vesting at twenty-one or marriage, nothing contained in that clause should interfere with the prior interests created by the settlement."

Then *Jackson* v. *Dover* (2) was relied on: a case which is important as shewing that the doctrine of *Howgrave* v. *Cartier* (3) is to be extended to a will. What the Vice-Chancellor says in the latter part of page 218 shews him to have been of opinion that there the words referring to survivorship were only intended to mark the time of payment, and not to define the class who were to take. That being so, the construction put upon the will was in accordance with the presumed intention, and the case in no way lays down as a positive rule (not a rule of construction, but a positive rule) that when there is a provision made, either by settlement or will, for children or grandchildren it must go to those who attain twenty-one or marry. In the present case I do not at all say that if we could make a will for this testator we could not make one more reasonable than the one we have before us, for if some of the children of the testator's daughter had died leaving families it would have been most unreasonable for the property to go over to the testator's cousins merely because the children had happened to die in their mother's lifetime. But we cannot make a will for him; we can only carry into effect his intention as gathered from the words of the gift over, unless there is something in the other parts of the will shewing that such was not his intention. Mr. *Vaughan Hawkins* referred to *Kennedy* v. *Sedgwick* (4) in support of the contention that other parts of the will are inconsistent with the construction we are adopting. That was a case where there was a direction to pay and divide the

(1) 4 D. J. & S. 256.
(2) 2 H. & M. 209.
(3) 3 V. & B. 79.
(4) 3 K. & J. 540.

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testator's residuary estate to and amongst the children of his daughter when the youngest attained twenty-one. Then in a later part of the will there was a gift over if the daughter should die without leaving any child or children. That gift over was inconsistent with the previous direction to pay and divide among the children when the youngest attained twenty-one, but there is no inconsistency in a gift over defeating a prior vested interest. There is nothing here to be urged against the natural interpretation of the gift over but this, that the disposition so construed is not such a disposition as we should have thought the best to make. The view which I have been expressing is confirmed by *Young* v. *Turner* (1), which was much commented upon by the Appellant. It was urged that this decision was disapproved of in *White* v. *Hill* (2), but that, in my opinion, is not so. Lord *Hatherley* pointed out that the words in *Young* v. *Turner* "leaving at the time of her decease" were very different from those in the case before him, which was one of a gift over on the death "without leaving any child or children." Here we have "if she shall not leave any child her surviving," which are like the words in *Young* v. *Turner*, not like the words in *White* v. *Hill*, where Lord *Hatherley* referred to the fact that where distinct reference is made to a period at which children must be living, it is much more difficult to construe "leaving" as "having" than where the expression is simply "leaving." In my opinion, on the true construction of this instrument, the words express the event on which the gift over was to take effect too clearly to admit of our modifying it, notwithstanding any view we may have that it would have been much better if the testator had made a different disposition.

FRY, L.J.:—

In this case we have a testator who was possessed of both real and personal property, of which he was minded to dispose separately. He had one daughter under age. He was a widower, and he appears to have had two relatives, Mr. *William Bennett* and Mrs. *Sarah Goodwin*, who were the objects of his bounty next to his daughter and her possible family, and in whom he placed the

(1) 1 B. & S. 550. (2) Law Rep. 4 Eq. 265.

greatest reliance. That being the position of the testator he makes a will of this kind. He first devises specifically to Mr. *Bennett* and Mrs. *Goodwin* the real estate of which he is possessed. He then vests in them the whole of his personal estate, not only as executors, but as trustees. He provides that they shall call in and convert the personal estate, and that they shall convert the realty in case they think proper so to do, and having constituted this mixed fund he proceeds to dispose of it in this way: after directions for investment, he gives it to the daughter for her separate use during her life, and after her death in trust for the children and child of his daughter who being a son or sons shall attain twenty-one or being a daughter or daughter shall attain twenty-one or marry. If there be only one such child the whole is to go to that one, and then he proceeds to use the language which is in controversy in this case: "In case my said daughter *Elizabeth Ann* shall happen to die without leaving any child or children her surviving, or leaving such they shall all die without having obtained a vested interest in the said trust moneys and without leaving any issue them, him, or her surviving," he gives the whole to his cousins, *William Bennett* and *Sarah Goodwin*. With regard to the realty he then proceeds to make this distinction, that in case his cousins shall not think fit to sell it then it is to be retained and is to be held for the benefit of his daughter for life, with remainder to all her children irrespective of attaining twenty-one or marrying, "and in case my said daughter shall depart this life without leaving any issue her surviving," then he gives his real estate over to Mr. *Bennett* and Mrs. *Goodwin*. It is obvious, therefore, that we have a somewhat capricious testator to deal with, because he has made his real estate pass in a different manner according to the discretion of the trustees. Now I will turn to the words that I have already mentioned, and which are mainly in controversy. I approach those words with certain rules of construction in my mind. In the first place I am bound, of course, by the general rule of adhering to the actual words the testator has used. But I am also bound by the rule that if words are ambiguous they are to be read rather as introducing a remainder than as a defeasance. Again, the interests of the children being clearly vested at twenty-

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one or marriage, I am bound not to defeat these prior gifts unless there be clear language of defeasance. And lastly, where we have a will of this description, which is obviously making a provision for the family, it is, so far as the language will allow, to be read in such a manner as to make the provisions for children available at the times when such provisions are usually required by the exigencies of the family. All those rules have been pressed upon us in some form or other by the Appellant's counsel, and I think they are sound rules by which to approach the construction of this clause. But, giving to them their full weight, I am unable to find in this case any possibility, without doing violence to the language of the testator, of reading this clause as creating a remainder, or as expressing anything other than a gift over on the contingencies which it expresses. To my mind the meaning of the language, according to the natural sense of the words, is plain. The testator provides for two contingencies, the one being his daughter dying without leaving any child her surviving. The words are emphatic ; it is not simply "without leaving any child," it is "without leaving any child her surviving." That is the first contingency. The next is, "or leaving such" (that is to say, in case my daughter shall die leaving children) "if they shall all die without having obtained a vested interest in the trust moneys, and without leaving any issue them, him, or her surviving." Now, obviously that gift over cannot be made to fit with the preceding gifts. It is impossible to read it so. Suppose the children attained twenty-one and so acquired vested interests, and all died in the lifetime of the mother, though they left issue nevertheless the gift over, if construed according to its terms, would operate. Now, that being so, a grave difficulty is presented in the way of the contention of the Appellant, because it is impossible to make the language fit the prior gifts so as to introduce a remainder. But it has been urged upon us that the language which introduces this gift over is language which is only properly used in cases of remainders, and that therefore we ought to give the limitation the effect of creating a remainder. There is force in the argument, but not sufficient force to carry the case over the other difficulties which it presents. It is suggested that we ought to read these words

"without having attained a vested interest and without leaving lawful issue" as qualifying not only the latter part of the clause but as qualifying the earlier part of the clause, and therefore we ought to read it in some manner into the gift over in case of the daughter dying leaving no issue her surviving. We were asked to hold that the first clause meant dying without leaving any child her surviving other than a child who has taken a vested interest in the trust moneys, but in my judgment the repetition of the words "without having attained a vested interest" makes no sense. Sir *Horace Davey* and Mr. *Vaughan Hawkins* felt great difficulty in giving any intelligible meaning to it, which shews how extremely difficult it is to torture the language into anything which will support their case. I think, therefore, we are compelled to read the language in its natural signification.

Now in that conclusion I confess I am strongly confirmed by the gift of the realty in the event of its not being sold. The testator gives it to the daughter for life with remainder to all her children, and in the event of her dying without leaving any issue her surviving, then to his cousins. In the first place let me observe that in that case also we have the words "and in case" introducing the defeating clause. It is obvious, therefore, that we cannot rely on those words in the earlier gift over as indicative of remainder not of defeasance. But what is to my mind of more importance is this—that this latter clause shews that we are dealing with a testator who was not unwilling to defeat the vested interests of his grandchildren, because it is obvious that if the real estate had not been sold, then if all the grandchildren of the testator died without issue in the lifetime of their mother, the gift over would take effect and defeat the vested interests which they acquired at their births. We are not, therefore, dealing with a will the general scope of which could be said to be the making adequate provision for issue at the time when that provision was naturally made, and which indicates a general unwillingness to defeat the vested interests, but we are dealing with a testator who in one case, beyond contradiction and without the possibility of doubt, defeated vested interests of grandchildren.

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I think the Appellant's case entirely fails, and that the decision of the learned Judge below must be affirmed.

LOPES, L.J. :—

After the exhaustive judgments which have been delivered, it would be extremely difficult to add anything, therefore I shall satisfy myself by saying very few words. The matter strikes me in this way. If the intention of the testator was that every child of his daughter who attained twenty-one should take a vested interest, absolute and indefeasible, though such child should die in the daughter's lifetime, then, to make the gift over consistent with that intention, it would be necessary to substitute the word "having" for "leaving" and to attach no meaning to the words "her surviving." This would be doing a violence to the language which nothing would warrant but a clear and unmistakeable intention collected from the other parts of the will, and such an intention to my mind is not apparent upon the face of this will. I therefore agree with the rest of the Court that the decision of the learned Judge below was right.

Solicitors: *Prideaux & Sons; T. D. Francis; Munns & Longden.*

H. C. J.

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[1887 C. 1146.]

C. A.
1888
NORTH, J.
Feb. 8.
C. A.
Aug. 10.

Discretionary Trust for Maintenance—Assignable Interest—Discretion of Trustees.

A testator directed his trustees, after the death of his wife, to apply the income of his estate "in and towards the maintenance, education, and advancement of my children in such manner as they shall deem most expedient until the youngest of my said children attains the age of twenty-one years," and on the happening of that event he directed them to divide his estate equally among all his children then living. The testator left four children, two of whom at the death of the widow in 1884 were of age, and the youngest was in his seventh year. After the decease of the widow the trustees paid each of the adult children one-fourth of the income, and applied the other two-fourths for the benefit of the minors equally till 1886, when *J. S. C.*, the eldest son, made an absolute assignment for value of all his interest under the testator's will to *H.* The trustees declining to pay one-fourth of the income to *H.* he took out a summons to have the construction of the will determined:—

Held (by the Court of Appeal, affirming the decision of *North*, J.), that no child of the testator was entitled, prior to the attainment of twenty-one by the youngest of the testator's children, to the payment of any part of the income, and that the trustees were entitled to apply the income for the maintenance, education, or advancement of the children, including *J. S. C.*, in their absolute discretion:—

Held, also (affirming the decision of *North*, J.), that *H.* was entitled to no interest in the income except such moneys or property, if any, as might be paid or delivered or appropriated for payment or delivery by the trustees to *J. S. C.*, and that the trustees could not pay or deliver to *J. S. C.* money or goods forming part of the income or purchased out of the income, for that such moneys and goods so paid or delivered, or appropriated to be paid or delivered, would pass by the assignment.

ALFRED COLEMAN, by will dated the 5th of August, 1875, gave his residuary estate to trustees upon trust to pay the income to his wife during widowhood, "but in the event of her death or second marriage then I direct my said trustees to apply such rents, interest, dividends, and annual proceeds in and towards the maintenance, education, and advancement of my children in such manner as they shall deem most expedient until the youngest of my said children attains the age of twenty-one

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years, and on his or her attaining that age then I direct my said trustees to distribute the whole of my said estate between my said children in such shares and proportions as my said wife, if then living, shall by deed or will appoint, or if dead, then equally between all my children then living, the shares of any females to be for their sole and separate use and free from the control, debts, or engagements of any husband."

The testator died on the 17th of May, 1880, leaving a wife and four children. The widow died in May, 1884, without exercising the power of appointment. At her death two of the children, of whom *John Soy Coleman* was the eldest, had attained twenty-one. The other two were minors at the time of these proceedings, the youngest being in the seventh year of his age at the widow's death.

On the 13th of April, 1886, *John Soy Coleman*, who was resident in *Australia*, sold and assigned absolutely to *David Henry* "all and singular the part or share, and all the income, property, moneys, securities, estates, and interests to which the said *J. S. Coleman* was or is entitled to, or which he may at any time hereafter become entitled to under the said will of his said father, the said *Alfred Coleman*, deceased, or in any other manner howsoever by reason of his decease, and all stocks, funds, and securities in or upon which the same, or any part thereof, were or are, or is now, or shall or may at any time hereafter be invested, and all interest to become due in respect thereof."

From the death of the widow the trustees had applied the income in equal shares for the benefit of the four children, paying one-fourth directly to each of the two adults. In June, 1886, formal notice of the above assignment was given to the trustees, with a request by *D. Henry* and by *J. S. Coleman* that the payments might thenceforth be made to *Henry*. The trustees were advised not to make any further payments in respect of *J. S. Coleman* without the sanction of the Court. They continued to apply three-fourths of the income for the benefit of the children other than *J. S. Coleman*, and kept the remaining fourth in hand.

In March, 1887, *Henry* took out an originating summons to have it decided whether the gift of capital to the children was

contingent on their being alive at the period of distribution, and if so, whether *J. S. Coleman* had an interest in the income which would pass by his assignment.

The summons was heard before Mr. Justice *North* on the 8th of February, 1888.

Everitt, Q.C., and *Clayton*, for *Henry* :—

There is a complete trust for the benefit of a person *sui juris*, the benefit of that is capable of assignment notwithstanding that the trustees here are under the terms to apply the subject of the trust themselves: *Rippon* v. *Norton* (1); *Green* v. *Spicer* (2); *Kearsley* v. *Woodcock* (3); *Younghusband* v. *Gisborne* (4). Here the trustees have in effect appropriated the income of three quarters to three of the children, and one quarter to *J. S. Coleman*; if appropriation is required to complete the title of the assignee nothing more can be necessary than what has been done.

S. Dickinson, for the infant children, was not called on.

Page, for the trustees.

NORTH, J. :—

I think here the trust created was a good trust, and that the assign, until the youngest child attains the age of twenty-one, is not entitled to have anything paid over to him.

I am asked, on the authority of certain cases, to deal with the question as if there had been a separate single trust for one person, but I think the cases referred to have nothing whatever to do with the present. In *Kearsley* v. *Woodcock* and *Younghusband* v. *Gisborne* there was a trust for the benefit of the persons entitled, and that being so, there was an interest which passed to the assignees. The present case seems to me entirely distinct. Here there is a gift after the death or the second marriage of the widow, in these words, "to apply such rents, dividends, interest, and annual proceeds in and towards the maintenance,

(1) 2 Beav. 63.
(2) 1 Russ. & My. 395.
(3) 3 Hare, 185.
(4) 1 Coll. 400.

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education and advancement of my children in such manner as they shall deem most expedient, until the youngest of my said children attains the age of 21 years," and then there is a trust for division, when that time comes, among those who are living at that time. It seems to me there is a trust there under which the trustees may, if they like, exclude one person altogether; and they certainly have power, if they please, to apply unequal portions of the income for the maintenance of the children as they may deem necessary or desirable. There is a trust to do this in such manner as they shall deem most expedient, and "most expedient" means most for the benefit of the children for whose benefit the income is to be applied. In my opinion it is necessary to apply the rents for these children's benefit, and if the trustees think it expedient to apply more for a daughter than a son, or more for an elder child than for a younger child, it is in their discretion to do so, and in such manner as is most expedient.

There are some observations of Vice-Chancellor *Shadwell* in the case of *Godden* v. *Crowhurst* (1), which seem to me to apply. He says: "Then the property is given for 'the maintenance and support of my said son, and any wife and child or children' (which is the event that has happened) 'he may have, and for the education of such issue or any of them, as they, my said trustees for the time being, shall, in their discretion, think fit.' Now there is nothing, in point of law, to invalidate such a gift, that I am aware of. It does not follow that anything was, of necessity, to be paid; but the property was to be applied; and there might have been a maintenance of the son, and of the wife and of the children, without their receiving any money at all. For instance, the trustees might take a house for their lodging, and they might give directions, to tradesmen, to supply the son and the wife and the children with all that was necessary for maintenance; and, therefore, my opinion is that I am not at liberty to take this as a mere gift for the benefit of the son, simply; but it is a gift for his benefit in the shape of maintenance and support of himself jointly with his wife and children, and, if that is the true construction of the gift in question, the

(1) 10 Sim. 642, 656.

result is that the assignees are not entitled to anything; but the consequence is that, if the trust was a perfect trust for accumulation, for the second period, the whole of the accumulated fund will, at the end of that period, be applicable for the maintenance and support of the son, the wife and the children collectively, and the assignees have no interest at all."

Under these circumstances I am of opinion that the assign is not entitled to call upon the trustees to hand over to him the one-fourth share of the income. It is said that it has been appropriated to the share of the son. I do not so understand from the evidence. There is no dispute about the application of three-fourths of the income. That has been applied for the benefit of the persons as to whose interest there is no dispute, who have not assigned, but inasmuch as a question has been raised as to anything that may be coming to the son, who has assigned, that money has been very properly and wisely kept in hand until that dispute has been settled.

Under these circumstances it seems to me that there is a good and valid trust to apply such part of the income as the trustees may think fit for the maintenance, education, and advancement of the children (including the son in question, if they think it expedient). Then I think this further follows—if they in the exercise of that discretion appropriate a part of it to him for his benefit, and propose to apply it for his benefit by handing it over to him, I think that would be an interest which would pass by the assignment, but if, instead of doing that, they think fit to apply it in some other way for his benefit, then in my opinion the assignee does not take the benefit of that provision by way of maintenance, or whatever it is, at all.

D. P.

The order as drawn up declared that no child of the testator is entitled, prior to the time when the youngest of his children attains the age of twenty-one years, to payment of, or has a transmissible interest in, one-fourth share or any part of the income of the residuary estate of the said *A. Coleman*, or the proceeds thereof, and that the Plaintiff has no claim, present or future, prior to that event, against the trustees of the will of the said

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A. Coleman for income, and that the trustees are entitled to employ the income for the benefit and maintenance of the children, including the said *J. S. Coleman*, at their absolute discretion.

Henry appealed from this decision. The appeal was heard on the 10th of August, 1888.

Everitt, Q.C., and *Clayton*, for the Appellant:—

We say that each child takes a vested interest in one-fourth of the income, and whatever comes in the way of property to an adult who is *sui juris* can be assigned. In *Rippon* v. *Norton* (1), under a very similar trust to the present, the assignee in insolvency of one of the beneficiaries was held entitled to an aliquot share.

[COTTON, L.J.:—That case does not help us, for no reasons are given.

FRY, L.J.:—I do not see my way to supporting the decision.]

In *Lord* v. *Bunn* (2) it was held that the trustees had a discretion, and they had a power of excluding any of the objects of the trust, but that so far as the insolvent took anything it would go to his assignee.

[THE COURT here intimated a doubt whether more was meant than that whatever interest the insolvent had if the trustees did not exercise any discretion would go to the assignee.]

In *Godden* v. *Crowhurst* (3) the power was not exclusive, but the provision was for a man and his wife and children, who were all living together, and it was held that the man's assignee in bankruptcy was not entitled to anything, but this was on the ground that the provision was not severable. In *Twopeny* v. *Peyton* (4) the trustees had power not to give the bankrupt anything, and on that ground his assignees could not take. In *Younghusband* v. *Gisborne* (5) a trust of income for the support, clothing, and maintenance of an adult was held to be a trust for his benefit, and to entitle his assignee in bankruptcy to the

(1) 2 Beav. 63.
(2) 2 Y. & C. (Ch.) 98.
(3) 10 Sim. 642.
(4) Ibid. 487.
(5) 1 Coll. 400.

income. In this case *Godden* v. *Crowhurst* (1) and *Twopeny* v. *Peyton* (2) were disapproved of. There cannot be an inalienable provision for an adult *sui juris*.

[FRY, L.J.:—Suppose a person elected as an inmate to an almhouse with an allowance of provisions.]

That is not property coming under a deed or will. In *Green* v. *Spicer* (3), where there was no power to apply otherwise than for the benefit of one person, the manner only being left discretionary, the income was held to pass to the assignee in insolvency. In *Hayes's* Conveyancing (4), it is stated that some conveyancers had thought that there could be an inalienable trust for the personal maintenance of a person *sui juris*, but the cases to which he refers shew that there must be a power to give the property to some one else, or it will pass to an assignee. The policy of the law is against inalienable trusts. To allow maintenance to be inalienable would be against the policy of the law: *Tudor's* Leading Cases on Real Property (5).

Decimus Sturges, for the infant children:—

The order does not seem to be happily worded, for a transmissible interest there certainly is, though only a contingent one. The case I make is this, that the assignor has no present property under the will, his interest in the capital is contingent, and until the youngest child attains twenty-one the income is held by the trustees upon trust to apply it for the benefit of the children as they think fit, so that no child is entitled to anything but what the trustees choose to give him. This is not like the cases where there was a vested gift with a discretionary power to take it away, still less is it like cases where there was a gift with a discretion as to the mode of its application.

[FRY, L.J.:—An assignment for value of whatever *A. B.* may take under the will of *C. D.*, who is still living, passes whatever *A. B.* ultimately takes under the will of *C. D.* Why may not this assignment pass whatever *J. S. Coleman* may take under the exercise of the discretion of the trustees?]

(1) 10 Sim. 642.
(2) Ibid. 487.
(3) 1 Russ. & My. 395.
(4) 5th Ed. vol. i. p. 506.
(5) 3rd Ed. p. 978.

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I do not dispute that if the trustees pay him anything it would pass by the assignment, and that the payment therefore would be made to the wrong person, but I contend that the trustees might apply it for his benefit in other ways without being interfered with, *e.g.* in paying his bills. The case, I submit, is covered by authority: *Godden* v. *Crowhurst* (1); *Wallace* v. *Anderson* (2). The cases cited against me do not affect my position. *Lord* v. *Bunn* (3) only decides that the assignee takes whatever the trustees determine to give to the assignor.

[FRY, L.J.:—Should you be satisfied with the following declarations:—

1. That no child is entitled prior to the attainment of twenty-one by the youngest of the testator's children to the payment of any part of the income of the residuary estate.

2. That the trustees are entitled to apply the said income for the maintenance, education, or advancement of the children, including *J. S. Coleman*, in their absolute discretion.

3. That the Plaintiff is entitled to no interest in the said income except such moneys or property, if any, as may be paid or delivered, or appropriated for payment or delivery by the trustees to the said *J. S. Coleman*.]

I should be satisfied with those declarations.

Page, for the trustees:—

We wish it to be decided whether we can send out goods to *J. S. Coleman*, and I submit that we may. Where a gift of income is for the benefit of the whole class with a discretion how it is to be applied, it has never been held that members of the class take a vested interest.

[FRY, L.J.:—A man may assign what he has not got, and the assignment becomes effectual if he gets it. If you send out goods to *J. S. Coleman*, why should not his assignee take them?]

No case goes so far as to make an assignment operate on what trustees may in their discretion allot to one of the objects of the

(1) 10 Sim. 642. (2) 16 Beav. 533.
(3) 2 Y. & C. (Ch.) 98.

trust: *In re Clarke* (1); *Official Receiver* v. *Tailby* (2). The interest of *J. S. Coleman* in the capital is contingent: *Hilliard* v. *Fulford* (3); and *In re Parker* (4) is against vesting by reason of such a trust for maintenance as this.

Clayton, in reply:—

In *In re Parker* the trust was to apply the income or such part thereof as the trustees should think fit—here the trust is to apply the whole income.

COTTON, L.J.:—

This an appeal from an order of Mr. Justice *North*, and we think that some alteration in its terms is requisite. The contention of the Appellant was that each of the four children took a vested interest in one-fourth of the income till the youngest child attained twenty-one. I am of opinion that no child has a right to any share of the income. The trustees have a discretion to apply the income for the maintenance of the children in such manner as they think fit. This excludes the notion of the children being entitled to aliquot shares. I will assume, though I do not decide, that the trustees have no power to exclude a child, but I am clearly of opinion that under this power they could make unequal allowances for the benefit of the children, and might allow only half-a-crown to one of them. This is not a void attempt to make shares given to children inalienable, so as to exclude their creditors, it is a power to the trustees to give to each child what they think fit, and if they cannot altogether exclude a child who has become bankrupt or assigned his interest, they can allot to him as little as they think desirable. Then does the assignment include every benefit which the trustees give to *J. S. Coleman* out of the income? I think not. If the trustees were to pay an hotel-keeper to give him a dinner he would get nothing but the right to eat a dinner, and that is not property which could pass by assignment or bankruptcy. But if they pay or deliver money or goods to him, or appropriate money or goods to be paid or delivered to him, the money or goods would pass by the assignment.

(1) 36 Ch. D. 348.
(2) 18 Q. B. D. 25; 13 App. Cas. 523.
(3) 42 L. J. (Ch.) 624.
(4) 16 Ch. D. 44.

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I think that the declaration proposed by Lord Justice *Fry* is right, and I am of opinion that the trustees will not be at liberty to send over money or goods to *J. S. Coleman.*

The strongest cases referred to by the counsel of the Appellant were *Green* v. *Spicer* (1), and *Younghusband* v. *Gisborne* (2), but in those cases the income was directed to be applied solely for the benefit of the insolvent, which made it his property, and an attempt was then made to prevent its being dealt with as his property if he became bankrupt. Here no property is given to *J. S. Coleman*, but only a discretion to the trustees to apply such part as they think fit of the income for his benefit. This case, therefore, does not come within the principle of those cases, and I think that the declaration proposed by the Lord Justice *Fry* is right.

FRY, and LOPES, L.JJ., concurred.

Solicitors for Plaintiff: *Boulton, Sons, & Sandeman.*
Solicitor for Defendants: *A. W. W. Holt.*

H. C. J.

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KEITH *v.* DAY.

[1886 K. 73.]

Foreclosure— Order for delivery of Possession—Rules of Supreme Court, 1883, *Order* XVIII., *r.* 2.

A summons for foreclosure asked for delivery of possession in the event of foreclosure. The usual foreclosure order was made without any direction as to delivery of possession. Default in payment having been made, the order for foreclosure was made absolute. The Plaintiff then moved in the action for an order on the Defendant to deliver up possession of the mortgaged property:—

Held (affirming the decision of *North*, J.), that such an order ought to be made, and that the Plaintiff ought not to be put to bring a new action for the purpose of recovering possession.

IN January, 1886, the Plaintiff, a legal mortgagee, took out an originating summons for foreclosure and delivery of possession.

(1) 1 Russ. & My. 395. (2) 1 Coll. 400.

On the 6th of November, 1886, an order was made for an account of what was due to the mortgagee for principal, interest, and costs, with a direction for reconveyance on payment, and foreclosure in default of payment, but with no direction for the mortgagor to deliver up possession if foreclosed. On the 15th of February, 1887, the Chief Clerk made his certificate, finding £8016 17*s.* 11*d.* due to the Plaintiff for principal, interest, and costs, which, with subsequent interest to the 15th of August, 1887, would amount to £8171 10*s.* 7*d.*, on which day the Defendant was directed to pay the amount. Default in payment was made, and ultimately, on the 11th of April, 1888, the order for foreclosure was made absolute.

On the 8th of August, 1888, the Plaintiff moved before Mr. Justice *North* for an order upon the Defendant to deliver up possession of the property to the Plaintiff within seven days after service of the order.

Cozens-Hardy, Q.C., and *Freeman*, for the Plaintiff:—

The Court has jurisdiction under the first proviso to Order XVIII., rule 2, to make an order for delivery up of possession in a foreclosure action, even where it is not asked for in the pleadings: *Salt* v. *Edgar* (1). Under the terms of the proviso the order for delivery of possession may be made either "on or after." Apart from the proviso the Court has jurisdiction to make the order now asked for, as it was part of the relief sought, and no judgment has yet been given on that part of the action.

Church, for the Defendant:—

The order for foreclosure absolute having been made, the action is now dead, and nothing more can be done in it: *Wills* v. *Luff* (2). The proviso to rule 2 of Order XVIII. does not help the Plaintiff; the words "on or after" refer to the time of delivery of possession, not the time of making the order.

NORTH, J.:—

I think I can make an order in your favour, Mr. *Hardy*, whatever be the true construction of the rule. I am not quite sure

(1) 54 L. T. (N.S.) 374. (2) 38 Ch. D. 197.

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whether the words in the rule "on or after" apply to the time of making the order against the Defendant, or to the time at which he is to deliver up possession of the mortgaged property. But whatever the true construction of the rule is, I think the Plaintiff is entitled to the order now, for this reason. The action is from first to last an action for foreclosure as well as an action for recovery of possession of land. The Plaintiff did apply for and get an order for foreclosure absolute; he might then have applied for the whole object of his action. Why he did not I do not know. It is said that that prevents him from now applying. I do not see why the expiration of the time at which he could get his foreclosure made absolute should be said to be the limit of the time for making an application for a material part of the object of the action. It seems to me that although the Plaintiff might have applied for the order for delivery of possession earlier, that does not disentitle him from applying for that relief now; subject to this, that he has made two applications for what might have been done in one, and I cannot give him costs.

C. A.

The Defendant appealed. The appeal was heard on the 10th of August, 1888.

Church, for the Appellant:—

It was suggested to Mr. Justice *North* that Order XVIII., rule 2, gave him jurisdiction to make this order, but I contend that it does not do so. The words "on or after" in the first proviso must, as a matter of construction, apply to the time when possession is to be delivered, not to the time of making the order for delivery. The second proviso applies only to a redemption suit, which does not stand on the same footing as a foreclosure suit, since the mortgagee is not seeking foreclosure. The direction to give up possession ought to be inserted in the foreclosure order: *Williamson* v. *Burrage* (1); and *Salt* v. *Edgar* (2) is not an authority for making the order after an order for foreclosure absolute. When the foreclosure has been made absolute the action is at an end, and no further order can be made in it:

(1) 56 L. T. (N.S.) 702. (2) 54 L. T. (N.S.) 374.

Wills v. *Luff* (1). In proviso 2 the case of an action which is at an end is provided for, but not in proviso 1.

Cozens-Hardy, Q.C., and *Freeman*, for the Plaintiff, were not called upon.

COTTON, L.J. :—

The question before us is whether, when a summons for foreclosure asks for delivery of possession, and an order for foreclosure is made without any direction as to possession, an order for delivery of possession can be made after final foreclosure. I do not say that such an order might not be inserted in the original order for foreclosure; but, in my opinion, it is not necessary that it should be, and if it is omitted the want may be supplied afterwards. Reliance was placed on the observations of Mr. Justice *Chitty* in *Williamson* v. *Burrage* (2), but though he considered that the direction ought to be inserted in the original order for foreclosure, he, in *Salt* v. *Edgar* (3), made an order for delivery of possession at a later stage. Reference was made to Order XVIII., rule 2, and the provisoes, but that rule does not confine the time of the application to the original hearing of the summons. The first proviso says: "Nothing in this order contained shall prevent any plaintiff in an action for foreclosure or redemption from asking for or obtaining an order against the defendant for delivery of the possession of the mortgaged property to the plaintiff on or after the order absolute for foreclosure or redemption, as the case may be." I do not think that those words mean that the order is to be obtained on or after the foreclosure absolute, but the time for making the application is not defined, and I think it would be wrong to put the Plaintiff to the unnecessary expense of commencing a new action for the sole purpose of obtaining possession because he has omitted to ask for it earlier. The second proviso is differently framed, but that is because in a redemption action foreclosure only takes place by the dismissal of the action, so that the action is then completely at an end; and the proviso was intended to enable the Court to give

(1) 38 Ch. D. 197. (2) 56 L. T. (N.S.) 702.
(3) 54 L. T. (N.S.) 374.

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the defendant his rights without any new action, which without this proviso could not have been done after the dismissal of the action.

FRY and LOPES, L.JJ., concurred.

Solicitors for Plaintiff: *Blake & Heseltine*, agents for *Keith, Blake, & Co., Norwich.*

Solicitor for Defendant: *Church.*

H. C. J.

C. A. 1888 KEKEWICH, J. *March* 2, 3. C. A. *July* 30, 31.

TARN *v.* TURNER.

[1887 T. 385.]

Mortgagor and Mortgagee—Agreement for Lease by Mortgagor—Mortgagee's Refusal to adopt Agreement—Tenant's Right to redeem.

Prior to the *Conveyancing Act*, 1881, a mortgagor, without the consent of his mortgagee, contracted in writing to grant *T.* a lease of the mortgaged premises for a term of years. *T.* entered into possession under the contract, and subsequently, on notice from the mortgagee, paid rent to him. The mortgagee having refused to concur in the lease to *T.*:—

Held (affirming the judgment of *Kekewich*, J.), that *T.* was entitled to redeem the mortgage.

Keech v. *Hall* (1) and *Pearce* v. *Morris* (2) considered and explained.

BY deed dated the 27th of January, 1881, and made between the Defendant *Wilson* of the one part, and *W. Turner* of the other part, *Wilson* demised a messuage and premises known as "*Fontainbleau*," situate in the hamlet of *Penge*, in the county of *Surrey*, to *W. Turner*, for the unexpired residue of a term of 250 years (less one day) granted by an indenture dated the 19th of January, 1877, by way of mortgage to secure the repayment with interest of the sum of £1500 then advanced by *W. Turner* to *Wilson*.

By an agreement in writing dated the 5th of February, 1885, and made between the Defendant *Wilson* of the one part, and the Plaintiff of the other part, *Wilson* agreed to grant the Plaintiff a lease of the premises comprised in the mortgage for a term of twenty-one years, determinable on notice at the end of the

(1) 1 Doug. 21. (2) Law Rep. 5 Ch. 227.

first seven or fourteen years at the yearly rents of £150 payable quarterly as therein mentioned; and *Wilson* agreed forthwith at his own expense to put the premises into thorough repair in accordance with a specification (the Plaintiff contributing £24 17*s.* towards the cost), and to make certain additions to and alterations in the said premises at an outlay not exceeding £160; and the Plaintiff agreed to pay *Wilson* the sum of £160, who thereby agreed to repay to the Plaintiff the sum of £150 on the termination of the tenancy. The agreement contained other usual provisions, and also provided that the lease and counterpart should be forthwith prepared and executed by and at the cost of the Plaintiff embodying all the matters and things therein set forth.

In pursuance of the agreement the Plaintiff went into possession of the premises and paid the Defendant *Wilson* the £24 17*s.* and the £160, and also expended considerable sums in other alterations and improvements.

The Plaintiff first became aware that the premises were in mortgage on the 27th of July, 1885, when he received a written notice from the Defendant *C. Turner*, the executor of *W. Turner*, requiring him not to pay any rent to the Defendant *Wilson;* and subsequently, in September, 1885, he received a further notice requiring him thenceforth to pay his rent to the Defendant *C. Turner*, which he did.

Negotiations for the concurrence of the Defendant *C. Turner* in the lease fell through, and an offer by the Plaintiff to redeem him having been refused, the Plaintiff commenced this action claiming specific performance of the agreement against both Defendants on the ground that the Defendant *C. Turner* had adopted the agreement, or in the alternative, redemption of the premises as against the Defendant *C. Turner*. The Defendant *Wilson* did not resist specific performance of the agreement. The Defendant *C. Turner* denied that he had adopted the agreement, and submitted that the Plaintiff was not entitled to redeem as against him. This was the trial of the action.

It appeared from the evidence that Messrs. *Morley & Shirreff*, the Defendants' solicitors, were second mortgagees of the property, and thereupon, by consent, the pleadings were taken as amended,

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Messrs. *Morley & Shirreff* being added as Defendants and the Plaintiff claiming to redeem them also.

The action came on before Mr. Justice *Kekewich* on the 2nd of March, 1888.

Warmington, Q.C., and *Alexander*, for the Plaintiff:—

The Plaintiff has a beneficial lease, and claims, first, to redeem the mortgagees and specific performance against the Defendant *Wilson*, or, in the alternative, specific performance against all the Defendants, on the ground that the mortgagees have adopted and confirmed the agreement for a lease. It is settled that the assignee of a partial interest in an equity of redemption can redeem: why not, then, a lessee for years? What is the difference between an assignee and a lessee? The observations of Lord *Mansfield* in *Keech* v. *Hall* (1) support our contention. Here the mortgagees refuse to adopt or confirm the lease, and the Plaintiff is entitled to accept their refusal and to insist on redemption.

Barber, Q.C., and *H. C. Deane*, for the Defendants:—

There is no case in the books in which it has been held that a tenant for years has such an interest in the equity of redemption as to entitle him to redeem, whether his tenancy is beneficial or at rack rent. No doubt persons who have a partial interest in the equity of redemption may redeem: *Pearce* v. *Morris* (2); but this right has never been extended to a tenant for years. The only authority that can be cited is the *obiter dictum* of Lord *Mansfield* in *Keech* v. *Hall*, but, with all deference, he was not very conversant with equity jurisprudence. If the Plaintiff is right, where is the line to be drawn? A mere tenant from year to year would come within the principle.

[KEKEWICH, J.:—In *Pearce* v. *Morris* Lord *Hatherley* says "any person interested in the equity of redemption is entitled to redeem." Why are those words to be cut down to a freehold interest?]

That passage also is mere *obiter dictum*, and is no authority on this particular point. If the right be granted it will be a new

(1) 1 Doug. 21. (2) Law Rep. 5 Ch. 227.

departure, going far beyond the general current of authority, and will let in a very numerous class of persons: *Fisher* on Mortgages (1); *Coote* on Mortgages (2). In the long list of persons entitled to redeem given in *Seton* on Decrees (3) a tenant for years is not mentioned, and *Keech* v. *Hall* (4) is not referred to. We submit that on principle a mere tenant for years is not entitled to redeem. The test is, is he a necessary party in an action to foreclose or redeem, in which all parties interested are always brought before the Court? Clearly not, and the reason is obvious. He has no interest in the land and is not affected by the proceedings. If a tenant for years is entitled to redeem it will lead to endless complications in the relations between the landlord, the tenant, and the mortgagee.

In the present case the action is at all events premature. The Plaintiff ought to have waited till he got his lease from *Wilson*.

KEKEWICH, J.:—

This is a very interesting question, and I think I can decide it on principle. Of course it is familiar to all of us that the law of equitable mortgages, and more especially that part of it which refers to the right to redeem, is founded, in the first instance, on what is usually called a legal mortgage, that is to say, a conveyance of land in fee by the mortgagor to the mortgagee with a proviso defeating that conveyance if a certain sum with interest is paid by a certain time. At the end of that time the money not having been paid there is an absolute estate in law. But the Court has held from the earliest times that the real contract between the parties is not one of vendor and purchaser, but that it is a security for money and the interest upon that money, and that if that money and interest be paid, then the right of the grantor is to have back his property in exchange for the money and interest. The Court of Equity gives effect to what it sees to be the real contract between the parties though it be not expressed on the face of the instrument. That has been extended to all sorts of mortgages, charges, and incumbrances; but the whole of the law on it is founded upon that one principle arising

(1) 4th Ed. pl. 1179.
(2) Page 1075.
(3) 4th Ed. p. 1051.
(4) 1 Doug. 21.

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out of the mortgage in fee, and one must bear that in mind throughout.

The Court having decided that the mortgagor has that right to redeem, construes it as really an estate in the land. It is not a legal estate, but what is termed an equitable estate—as much an interest in the land as the real fee simple. It is a fee simple subject to a charge, and is vulgarly styled in legal language the equity of redemption. Now, having got so far, the next step is natural and easy. The mortgagor has an estate in the land, and he can deal with that estate in the land just as much as if he had never made a mortgage, and can sell it, settle it, create charges upon it in favour of his wife or children, or demise it; he can do anything he pleases with it, as if he had the estate in fee unencumbered, but always subject to the mortgage. The next step again is easy and natural: when he conveys away his estate or part of his estate in the land he necessarily gives to each of the persons in whose favour he grants an estate the right to do that which he himself can do, that is, to redeem the mortgage. To give anything else would be to give that which would be of no avail to him to whom he makes the grant. Therefore it has always been held since the doctrine of redemption has been worked out in Courts of Equity that any person who is thus entitled to an interest carved out of the fee simple is entitled to come in and redeem, subject of course to any other equities paramount which affect the estate, only coming in in his proper place and being necessarily subject to those who are prior to him. Well, now, I am told that that does not affect a grant or demise for years: that although if the mortgagor were to grant an estate in fee, or for life, or to make a provision for a jointure for his wife, or to provide for her by will a rent-charge in the nature of dower, to charge portions or otherwise carve an interest out of his estate in that way, although each of those persons would be entitled to redeem, yet, if he demises for ninety-nine years or for twenty-one years, a tenant for years is not entitled to redeem. It strikes me that is contradictory of the whole principle on which the doctrine of equity of redemption depends. The answer is that there is no authority on the point, that this law of redemption has now been well settled for

a great many years, and that in no text-book can you find any recognition of the right of a tenant for years to redeem: that in *Seton* on Decrees (1), to which Mr. *Deane* has referred me, where you have a whole page enumerating the persons who are entitled to redeem, with references to the authorities relating to the particular cases, you find nothing referring to a tenant for years. That may be so. I find, however, on this very page this statement: "As a general rule the mortgagor and all persons having any interest in the equity of redemption may redeem, as in the following instances": and then the first instance given is "Assignees of the mortgagor." Why not, then, assignees by demise as well as in any other way? However, of course, the fact that there is no authority in the strict sense requires consideration. There are two reasons which are generally given, one on the one side and one on the other, for lack of authority in favour of a particular proposition. One party says, "Of course there is no authority to be found on it, because nobody ever doubted it: there has never been any dispute about it." The other side say, "Of course there is no authority, because nobody has ever been foolish enough to raise this question, and it has always been known that the proposition is bad." It is probably unwise in the majority of cases to speculate why there is no authority, if there be none, but I think in the case of *Keech* v. *Hall* (2) you find expressed in rather enigmatical language why you do not find authority upon the point now in question. Lord *Mansfield* says: "Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant," and, as I understand him to mean, there being continuation, you never hear in that case of redemption, because the mortgagee continues the tenant, and being tenant of course he cannot redeem. "And where it is" [a beneficial lease] "the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it." That is what I understand Lord *Mansfield* to mean: that is to my mind his practical view of the proposition, and it is, I think, a strictly true one. It is immaterial whether he meant to decide or did decide that a tenant might redeem. I take it for granted rather that he explains there the relative positions of mortgagor

(1) 4th. Ed. p. 1051. (2) 1 Doug. 21.

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and mortgagee where the lease is beneficial and where it is not beneficial. I am sure he does not mean that there is any difference, as regards the right, between the cases where the lease is beneficial and where it is not beneficial. Where, as I understand it, it is not beneficial he says you do not expect to find redemption because the mortgagee is glad to keep his tenant. Then I am told there is no authority, and that in all suits for foreclosure the tenant has never been brought in as a party, and that the reason is that he could not be hurt by foreclosure. Probably the case seldom occurs, and therefore perhaps it is that we cannot find an instance. The mere fact that nobody has seen a tenant for years made a party to a foreclosure suit does not seem to me to carry the question any further. There is, however, one recent authority which has been referred to, and a very useful one it is, I mean the case of *Pearce* v. *Morris* (1). Of course, I do not propose to quote as an authority the language of any counsel, however eminent; that is not an authority to guide me in the least; still it is not, I consider, beside the question to look at what Sir *G. Jessel*, then Mr. *Jessel*, says there. In arguing the case he says that "any person who is entitled to an interest in any part of the land may redeem." To my mind it is by no means the worst or the least important part of that statement that the word "any" is repeated twice. Mr. *Deane* pointed out that the words are "in any part of the land," but the real point is that however small the interest is he is entitled to redeem, and in that sense Lord *Hatherley* accepts it when he says that "any person interested in the equity of redemption is entitled to redeem."

That seems to me to be the principle on which Courts of Equity have proceeded, and I see no reason why it should not apply to a tenant for years as well as to any other person claiming as assignee of the mortgagor. I do not think I am extending it in the slightest, but only applying it to the case which has arisen *pro re natâ*. In this case we have an agreement for a lease; Mr. *Tarn* is in possession, and as tenant has remained after the date of the mortgage without any notice to him. Whatever other value it may have, that is an assignment to him of a partial

(1) Law Rep. 5 Ch. 227.

interest in the property carved by the mortgagor out of his equity of redemption. That, according to authority and according to principle, entitles that assignee to redeem. I decide that Mr. *Tarn* as tenant under that agreement is entitled to say to the mortgagee, "I will redeem you." I must therefore declare his right to redeem.

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H. L. F.

From this judgment the Defendants, the mortgagees, appealed. The appeal was heard on the 30th and 31st of July, 1888.

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Barber, Q.C., and *H. C. Deane*, for the Appellants, referred to *Keech* v. *Hall* (1), *Pearce* v. *Morris* (2), *Fisher* on Mortgages (3), and *Coote* on Mortgages (4).

Warmington, Q.C., and *Alexander*, for the Plaintiff, were not called on.

COTTON, L.J.:—

This is an appeal against a judgment of Mr. Justice *Kekewich*, who gave the Plaintiff in the action a redemption decree as against two incumbrancers—the representatives of Mr. *Turner*, who are the first mortgagees, and the second mortgagees, who were brought in after the commencement of the action. He did not give any opportunity to the mortgagor, who was a party, to redeem, but as I understand that was not asked for; and as I pointed out during the argument it was very natural that the mortgagor, not being, I suppose, overburdened with money, did not ask for that, because if he did not redeem he would be foreclosed. However, the mortgagor—the owner of the equity of redemption, has not appealed, and all we have to consider is the objection raised on behalf of the mortgagees.

The facts are very simple. There was the mortgage to *Turner* and a subsequent mortgage also, and then the mortgagor, without the concurrence of the mortgagee, entered into the agreement with the Plaintiff to grant him a lease. It is conceded

(1) 1 Doug. 21.
(2) Law Rep. 5 Ch. 227.
(3) 4th Ed. p. 1179.
(4) Page 1075.

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although no lease has actually been granted the terms are sufficiently specified in the agreement, so that there is no difficulty as between the Plaintiff and the Defendant, who is the owner of the equity of redemption, in granting a decree for specific performance and to have the lease executed by *Wilson* to *Tarn*. But the mortgagee not being in any way a party to that agreement was not in any way bound to take the Plaintiff as his tenant or to grant any lease at all. He says that he was willing to grant a lease, but although he was willing to join and to give the Plaintiff the legal estate during the term, he was not willing to put himself in the position of landlord to the tenant on the terms which he had agreed to, because, as I pointed out, and it was not disputed that it is correct, it was part of the agreement as between *Tarn* and *Wilson* that *Wilson*, who was to be his landlord, should at the expiration of the term repay to *Tarn* certain moneys or part of certain moneys which he was to expend in improving or repairing the property, and that *Turner* refused to agree to. What was the position? *Tarn* had got by demise an interest in the equity of redemption, and as the Defendant was not bound at all by any contract to grant him a lease, if a lease had been granted in pursuance of that agreement, then at any time the mortgagee might have interposed and have said to the tenant, *Tarn*, even after having expended money, "I am not bound by your agreement; there is no contract as between me and you which you can enforce in a Court of Equity. I have got the estate and have a perfect right to turn you out at any time." Will the Court of Equity allow that? The Court of Equity always says—What is the real contract? When it is a mere security for money, and when the money is tendered with interest, then we direct the mortgagee to divest himself of the legal estate and not to insist on such legal rights as he has. Then why is the tenant, who holds under an agreement such as I have mentioned, not to be entitled to redeem, which is the only way of relieving himself from the effect of the mortgage. In my opinion it seems so clear that I should have doubted if there could have been so ingenious an argument addressed to us on the point. Here is a man who has a certain interest in the equity of redemption, and he may be prejudiced by the action of the mortgagee

insisting on his rights as legal owner of the property. The answer must be—Yes, that is quite true, but if the tenant likes to redeem he can do so. The interest which he got from the mortgagor makes him to a certain extent an assignee of the equity of redemption, and therefore entitled to all the rights which appertain to the owner for the time being, however small his interest in the equity of redemption may be with regard to duration of time. That, as I understand, is recognised in all the cases. In *Pearce* v. *Morris* (1), which was referred to, Lord *Hatherley* points out that anyone entitled to an interest in the equity of redemption is entitled to redeem. There it is very true that the mortgagee was insisting on his rights so as to defeat the interest of the person there having the interest in the equity of redemption, and here the mortgagee does not do so, but he may at any time do so, and unless the tenant has the right to redeem, there being nothing except the right to redeem to bind the mortgagee, the mortgagee would retain the estate. What are the objections to the right of the Plaintiff? It is said, first of all, that the action is premature, and if he would be otherwise entitled to a decree of redemption, yet he ought to have waited till he got a lease from the mortgagor. If there was a contest as to his right to require the mortgagor to grant a lease, that is to say, if he had raised any objection to the title of the mortgagor, and said, "I will not perform my contract to take the lease," or if there had been any other point which prevented the Plaintiff from saying that he had a contract he could have enforced in equity, the objection would be good, but here, as I understand, there is nothing to prevent, as between the Plaintiff and *Wilson*, a decree for specific performance directing a lease to be granted by *Wilson*. It is very different from the case in *Pearce* v. *Morris*, where there was a contract between vendor and purchaser, the Plaintiff being purchaser. The purchaser had not accepted the title, and had said: "I will not accept it unless you get the consent of certain other parties." The mortgagee insisted that as matters stood he was not bound by the contract until that point was settled. Until the vendor and purchaser had settled their differences the purchaser was not entitled to say he was in the position of one who had

(1) Law Rep. 5 Ch. 227.

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really an interest or estate in the equity of redemption. That being so, I cannot think there can be any difficulty on the point of the action being premature. Here I do not think Mr. Justice *Kekewich's* judgment in any way directs that there should be an absolute conveyance to the Plaintiff; it would be a conveyance on redemption subject to such rights of redemption as may exist in any other person, parties to the suit or not; it will not be a conveyance of the absolute interest, but merely a conveyance of that mortgage interest which *Turner* and the other mortgagees had.

Then there was another point argued, that if the Plaintiff gets redemption and gets the mortgage conveyed to him, it will entirely alter his position as between *Wilson*, his landlord, and himself. But in my opinion that is a difficulty we ought not to consider, because if *Wilson* likes to redeem in order to enable a new lease to be granted to his tenant, and one which cannot be put an end to by the mortgagee exercising the right to turn him out, he may pay off the mortgage and put himself in the position of having the mortgage, and therefore being entitled to grant a lease. I do not see myself any such great difficulty as could possibly induce us to say that this Plaintiff ought not to redeem. He still has his tenancy as between himself and the landlord; he probably will become mortgagee in possession, and if so, then during his tenancy as mortgagee in possession he will be accountable for the rent received under this lease, and after that as mortgagee in possession will be chargeable with such a rent as will be a reasonable rent. There may be, therefore, no difficulties arising, but difficulties often arise as between the landlord and his tenant and other persons if he mortgages, and is not in a position when necessary to redeem the mortgage, and, as I pointed out, there is no appeal whatever on behalf of *Wilson;* and even if there were difficulties in the case such as were pointed out by Mr. *Barber*, we could not take into account those objections in considering whether it was right as against the mortgagee to grant this redemption.

Then another objection taken is that we do not find this special case has ever been raised, and Mr. *Barber* has said there is a sort of opinion in the profession that a tenant shall not be

considered as having a right to redeem. It is very easy to account for that. If the lease is a good one for the landlord, the mortgagee, when he forecloses, is very ready to adopt it, and it is not very often that a tenant is in such a position that he is willing, in order to preserve his tenancy, to pay the value of the mortgagee's interest, and, as I have already pointed out, the mortgagee may have got a mortgage for the full value of the land. For my part I am not disturbed by the consideration that a case comes before us for the first time; it is rather a pleasure that a question comes not touched by any direct authority, which we have to deal with on something like principle.

Then there was another point pressed upon us, that is, the difficulties that would arise with reference to the parties in a foreclosure action. I do not think we ought to deprive the Plaintiff of what are his rights because in other actions there may be difficulty in ascertaining who are to be the proper parties. When a mortgagee comes to foreclose, he knows what the condition of the land is, who is in possession, and has learnt very well what the tenancies are, and will be able to make up his mind as to whether he will accept the tenants on the terms of their tenancies. There may be difficulty undoubtedly, but, in my opinion, if there is difficulty it would not preclude me from granting the Plaintiff what are his rights.

The only difficulty I had was as to the costs of the action. The Plaintiff brings his action undoubtedly on an allegation that the Defendant *Turner* is bound to grant him his lease. I think there is no case for that at all, and if it had been asked for, I think the Judge would have dismissed that portion of the action with costs. But as regards redemption I think the Judge was quite right in following the ordinary course in directing *Turner* to pay the costs up to the hearing. I cannot think there can be any great costs incurred as a consequence of asking for specific performance, when he had no right to it.

FRY, L.J.:—

This case has been so fully and elaborately argued that it is proper I should add a few words upon the questions raised. The facts are shortly these. *Wilson*, being the owner of a certain house, mortgages it to *Turner*. The deed contains, as usual, a proviso

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that if *Wilson* or his assigns shall pay the mortgage money and interest to *Turner*, *Turner* will convey to *Wilson* or his assigns. After the mortgage was executed, *Wilson* enters into an agreement with *Tarn*, the Plaintiff, for a lease of twenty-one years of that property. Now according to my view of the meaning of the words, *Tarn* is the assign of *Wilson*. In saying that I do not forget the point to which I will later refer, namely the question of the difference between an agreement and an actual lease. Subject to that it appears to me that *Tarn* is an assign of the equity of redemption, and therefore I think he has a right to redeem under the very words of the instrument itself. I should however be sorry to put my conclusion simply upon the words of that proviso, because I understand the law to be plainly, that which is asserted by Lord *Hatherley* in the case of *Pearce* v. *Morris* (1): "Any person interested in the equity of redemption is entitled to redeem." Mr. *Barber* and Mr. *Deane* have not shewn any exceptions to that rule. I rather invited them to shew what the true rule is, if that be not the true rule; but it has been admitted, and can hardly be denied, that the rule is rightly expressed in the words which Lord *Hatherley* used. Therefore, it appears to me that according to the general law of the land a person who claims as lessee under a mortgagor after the mortgage, and has thereby derived an interest in the equity of redemption, has the right to redeem. It was pressed upon us that very grave inconveniences would follow from that decision; but even if it be so, look at the extreme inconvenience and injustice which would follow from the other decision, namely that a person who takes by way of demise would not be entitled to redeem; for then a person might have a term of 999 years at a peppercorn rent and yet be incapable of redeeming. It appears to me that would be a grave injustice, and that the effect of the rule which we are asked to lay down would be seriously to interfere with the power of the mortgagor in possession of dealing with his property. It is not necessary to enlarge upon the point, but everybody would see the inconvenience of denying to a tenant, who had laid out very large sums of money on the faith of the interest he has acquired from the mortgagor, of the right to redeem. It puts him at the absolute mercy of the mortgagee,

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who might evict him without any corresponding power of the lessee to defend himself by redeeming the mortgage.

Then we were pressed with this point, that if a man was at once tenant and mortgagee, delicate questions might arise as to the position in which he stood; and as to the character in which he did particular acts. No doubt, that is true, delicate questions may arise, but delicate questions have arisen, and will continue to arise out of the relations of mortgagor and mortgagee, especially when it is complicated with other relations. So much for the general question.

Then Mr. *Barber* relied on the particular circumstances of this case, namely, that *Tarn* had an agreement for a lease only and not a lease itself. If there were any contest with regard to the rights of *Tarn*, if it was not clear, and admitted to be clear, that he is entitled to a lease, there might be much force in the contention which has been raised, but here in the pleadings the Defendant *Wilson* states that he is and always has been ready and willing to grant the Plaintiff a lease of the premises in conformity with the agreement so far as it empowers the said Defendant so to do. There is no question at all between them. As far as it appears, *Tarn* has done everything on his part to entitle him to specific performance. There is no such question as there was in *Pearce* v. *Morris* (1) with regard to non-acceptance of title. We have, therefore, a case in which, by confession in the pleadings and statements at the bar, we are bound to conclude that the equitable interest has been vested in *Tarn*, and where that is so the mere fact that the parties did not execute the lease, is in my judgment immaterial.

Then we have been pressed with this; it is said that the mortgagee has by his pleadings offered to grant a lease; and therefore offered to do everything which he could be bound to do. What the mortgagee did offer is this, he offered to grant the Plaintiff a lease of the premises in conformity with the agreement provided that the lease did not impose any personal obligation on the Defendant *Turner;*—but it is impossible for *Turner* to place himself in the shoes of *Wilson* without taking personal obligations, nay more, it seems to me it is impossible for him to execute the lease personally as to clothe *Tarn* with the legal

(1) Law Rep. 5 Ch. 227.

C. A. 1888 TARN v. TURNER. Fry, L.J.

interest under the agreement without rendering himself liable to certain personal obligations. I think, therefore, that the offer is not one that at all prevents the Plaintiff from exercising the right to his redemption which he would otherwise have had.

The question of costs has been already dealt with by Lord Justice *Cotton* in a manner with which I entirely concur for these reasons. I entertain no doubt as to the general right of a lessee who takes a lease after a mortgage to redeem. I trust and believe that our decision will not lead to any inconvenience or add to the already numerous parties to such suits for reasons which have already been indicated by the Lord Justice. I think there is no circumstance in this particular case which gives the Plaintiff any less rights than the lessee ordinarily would have who takes a lease granted after the mortgage.

LOPES, L.J.:—

Since the mortgage by *Wilson* to the Defendant, the Plaintiff has agreed to become tenant of the mortgagor and is entitled to a lease. There is no binding agreement for any tenancy between the Plaintiff and the mortgagee, the Defendant *Turner*. The position of the Plaintiff, therefore, is this, that unless he is allowed to redeem he may be evicted by the Defendant. In these circumstances has he a right to redeem? I think he has. It is clear that the assignee of the mortgagor can redeem; and I can see no difference between the assignee of the whole estate of a mortgagor and an assignee by demise such as the Plaintiff is in this case. The Plaintiff has an interest in the equity of redemption, and can therefore redeem. In *Keech* v. *Hall* (1) Lord *Mansfield* says, "Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it."

It appears to me there is clear authority for the conclusion at which we have arrived—that the decision of the learned Judge below was right.

Solicitors: *W. F. Tarn; Morley & Shirreff.*

(1) 1 Doug. 21.

M. W.

In re BRIANT. POULTER *v.* SHACKEL.

[1887 B. 2154.]

KAY, J.
1888
June 23, 25.

Husband and Wife—Legacy to Wife—Husband's Debt—Executor—Retainer—Equity to a Settlement—Practice—Originating Summons—Rules of Supreme Court, 1883, *Order* LV.—*Order declaring Settlement, Form of.*

A testator gave his residuary estate to his executors in trust for his wife for life, and after her death, in trust for sale and to divide the proceeds among his children equally. The testator left six children, one of whom, a daughter, had married in his lifetime, without a settlement. At the death of the testator in 1877 the daughter's husband was indebted to the testator in a sum exceeding the amount of the wife's share of residue. On the death of the testator's widow in 1886 the executors of the will claimed to retain the daughter's share for her husband's debt; but on the hearing of an originating summons, under Order LV., by the executors against the residuary legatees, including the daughter and her husband, the daughter asserted her equity to a settlement:—

Held, that the executors had a right of retainer, but that the wife's equity preceded that right: and accordingly, having regard to the means and position in life of the husband and wife, the Court made an order on the summons declaring a settlement of a portion of the wife's share upon herself and her children, and directing the balance to be retained *pro tanto* against the debt due from the husband to the testator's estate and to be divided among the other residuary legatees, excluding the wife.

The doctrine of the executor's right of retainer of a wife's legacy for he husband's debt to the testator, and the wife's paramount equity to a settlement out of the legacy, discussed.

Knight v. *Knight* (1) questioned.

ROBERT BRIANT, plumber, who died in 1877, by his will dated in 1875, devised and bequeathed his residuary real and personal estate to his wife and two other persons upon trust for his wife for life; and after her death he directed his trustees to sell and convert his residuary real and personal estate, and to pay the proceeds to all his children in equal shares "for his, her, and their own absolute use and benefit," and the testator then proceeded to settle the share of a married daughter, Mrs. *Shepherd*, upon herself, her husband and children. And he directed his trustees to deduct any debt due to him from any or either of his

(1) Law Rep. 18 Eq. 487.

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children, with interest thereon at 5 per cent. from the shares or share to which they, he, or she were entitled under that his will. And he appointed the three trustees his executors.

The testator left six children, one of whom, a daughter, had in his lifetime, before the date of the will, married *Edward Shackel*. The testator's widow died on the 5th of February, 1886.

The testator's residuary estate consisted of a sum of about £4000.

During the testator's lifetime, his son-in-law, *Edward Shackel*, had been in a small way of business as a grocer, and to assist him in this business and in the pecuniary difficulties into which he had fallen, the testator had advanced him various sums of money amounting in the whole to about £750, which sum remained due from him to the testator at the time of the death of the latter. Mr. and Mrs. *Shackel* were both now living, but Mrs. *Shackel* was in an infirm state of health, having for about five years past been partially paralysed. They had six children, all of whom were now living. No settlement was made on the marriage of Mr. and Mrs. *Shackel*. The debt due from Mr. *Shackel* considerably exceeded the share of residue coming to his wife.

Upon the trustees and executors of the will proceeding to divide the testator's residuary estate upon the death of the widow, the tenant for life, a question, amongst others, arose whether they were entitled to deduct from the one-sixth share given to Mrs. *Shackel*, the debt of £750 due from her husband to the testator's estate.

This question now came on for the decision of the Court upon an originating summons, which had been taken out under Order LV., by the trustees and executors of the will against the residuary legatees, for an inquiry as to what debts were due to the testator from any and which of his children or their respective husbands, also in what shares, having regard to such debts, if any, the testator's residuary estate was now distributable: and, so far as necessary, administration of the trusts of the residuary estate. From the evidence it appeared that, owing to his pecuniary embarrassments, *Edward Shackel* had been for some time past unable properly to maintain his wife and children, and that his only means of subsistence was derived from commissions for collection

of rents, amounting to about £60 a year; also that his wife had no other means than what she took under her father's will, and an income of about £70 a year, being the rent of property devised by an uncle to her for life (whether or not for her separate use did not appear) with remainder to her children. Mrs. *Shackel*, by her counsel at the hearing of the summons, claimed to have the whole of her share under her father's will settled on herself and her children.

The whole of the fund constituting the residuary estate was at present in the hands of the trustees.

Marten, Q.C., and *Vaughan Hawkins*, for the Plaintiffs, the trustees and executors of the will, and for three of the Defendants, residuary legatees:—

The right of the executors to retain or set off the debt due from Mr. *Shackel* to the estate must prevail over Mrs. *Shackel's* equity to a settlement, if any.

[KAY, J.:—Does the right of retainer affect a derivative interest?]

Yes. *Bousfield* v. *Lawford* (1) is an authority to that effect. The gift to Mrs. *Shackel* was in effect a gift to her husband. The equity of a married woman to a settlement is an obligation which fastens, not on the property, but upon the right to receive it: *Osborn* v. *Morgan* (2). Here, the husband being indebted to the testator, had no right to receive anything. I rely on *Knight* v. *Knight* (3), where the sole executor of a will, the husband of a residuary legatee, was indebted to the estate to an amount exceeding the share of his wife, and Vice-Chancellor *Hall*, following *Osborn* v. *Morgan*, held that no equity to a settlement arose in favour of the wife. *Ranking* v. *Barnard* (4); *Ex parte O'Ferrall* (5); *Hall* v. *Hill* (6); *MacMahon* v. *Burchell* (7), and *In re Cordwell's Estate* (8), are also authorities in favour of the right of an executor or administrator to retain a debt of the husband due

(1) 1 D. J. & S. 459.
(2) 9 Hare, 432.
(3) Law Rep. 18 Eq. 487.
(4) 5 Madd. 32.
(5) 1 Glyn. & J. 347.
(6) 1 D. & War. 94.
(7) 3 Hare, 97, 99; corrected, 5 Hare, 322, 325.
(8) Law Rep. 20 Eq. 644.

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to the testator or intestate out of a legacy or share coming to the wife. Here the wife had the benefit of all the advances equally with the husband, so she cannot now assert her equity against him.

[They also cited *Lady Elibank* v. *Montolieu* (1); *In re Batchelor* (2); *M'Cormick* v. *Garnett* (3), and *Burrough* v. *Moss* (4).]

[KAY, J., referred to *Carr* v. *Taylor* (5) and *Williams* on Executors (6).]

MacSwinney, for the Defendants, Mr. and Mrs. *Shackel*:—

Knight v. *Knight* (7) is really the only case against me, and it is opposed to all the authorities, none of which were cited. Moreover that case is distinguishable from the present, for there the husband was sole executor, and Vice-Chancellor *Hall* seems to have decided the case on that ground. Here the money is in the hands of trustees, and the Court is dealing with the common case of a *chose in action* in the hands of trustees in respect of which the wife is coming to assert her equity. As there has been no reduction into possession, the wife may assert her equity: if there had been such reduction, then there would be no right of retainer. I ask that the whole fund may be settled for the benefit of the wife and children, as in *Taunton* v. *Morris* (8).

[KAY, J., referred to *In re Suggitt's Trusts* (9) as to the discretionary power of the Court to fix the proportion to be settled on the wife and her children under her equity.]

A. W. Rowden, for the Defendants, Mr. and Mrs. *Shepherd*.

Marten, in reply.

KAY, J.:—

This case raises a difficult question of law. The facts I understand to be shortly these. The testator gives his residuary pro-

(1) 5 Ves. 737.
(2) Law Rep. 16 Eq. 481.
(3) 2 Sm. & Giff. 37; 5 D. M. & G. 278.
(4) 10 B. & C. 558.
(5) 10 Ves. 574.
(6) 6th Ed. p. 1214.
(7) Law Rep. 18 Eq. 487.
(8) 11 Ch. D. 779.
(9) Law Rep. 3 Ch. 215.

perty upon trust to convert and divide the proceeds between certain persons, one of whom, a daughter, was then a married woman. That direction was subject to a preceding tenancy for life which has now ceased. The husband and wife are both living. There was no settlement made upon their marriage. The husband is, according to the evidence, in business which produces a very small income, and the husband and wife have six children, the only other property of the wife being the sum of £70 a year (as to which I am not told whether it is settled to her separate use or not) to which she is entitled under another will for her life.

Now, first of all, the husband is indebted to the testator in a sum of some £750, which is very much more than the share of the residue which is so bequeathed in trust for the wife; and the first question here is, whether the executors of the testator have a right to set off that debt due from the husband to the estate of the testator against the provision made for the wife.

As to that, the cases have determined that there does exist such a right of retainer. In *Ranking* v. *Barnard* (1), before Sir *John Leach*, a legacy of £1000 had been given to the wife of *John Ansley*, who was indebted to the testator in a sum of £27,000; after the death of the testator he became bankrupt, and the question was whether the legacy to his wife could be retained as against that large debt. The Vice-Chancellor, Sir *John Leach*, says: "My present impression is, that this legacy might have been retained by the executors, if there had been no bankruptcy, and that the assignees can only stand in the situation of the bankrupt; but I will look into the cases." Then, at a later date, he says this: "The view I took of this point is confirmed on looking into the cases. In *Jeffs* v. *Wood* (2) the judgment of Sir *J. Jekyll* is in strict conformity with the opinion I before expressed. A legacy to the wife is at law a legacy to the husband; but in equity, it is subject to a claim of the wife for a provision out of it, for herself and children. This lady has died without asserting such a claim; and the legacy being discharged of her equity, would have become the absolute property of the husband, if there had been no bankruptcy. It is clear,

(1) 5 Madd. 32. (2) 2 P. Wms. 128.

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that as against the husband, the executors of the testatrix would have had a right to satisfy the legacy, by writing off so much of the debt due from the husband to the estate of the testatrix, and they must have the same right against the assignees of the husband."

I take it, therefore, to be perfectly well settled that, as against the right of the husband in the legacy given to his wife, the executors of the testator may set off the debt due from the husband to the testator in his lifetime.

Then arises this question: supposing the wife to assert her equity to a settlement, the property being such as she could assert her equity against or in respect of, does the equity precede the right of retainer, or does the right of retainer precede the equity? The argument is this—and it is well founded in many of its propositions: an equity to a settlement arises when the husband makes a claim to the property, upon his making the claim to the property he is bound to do equity, and if the wife is not properly provided for, the Court, at the instance of the wife, will direct a settlement of the whole or a part of her property, according to the circumstances, upon her and her children. It is said that the equity only arises when the claim is made by the husband. Well, that doctrine has been modified in some of the recent cases, as we know, because now the wife is enabled as a plaintiff in a Court of Equity to assert that equity. She may take proceedings to assert the equity, whether before or after a claim is made by the husband. That has been asserted in many cases, and was expressly decided in, amongst other cases, the case of *Wortham* v. *Pemberton* (1). The argument therefore is, that as, according to the decision in *Osborn* v. *Morgan* (2), the wife's right to her equity to a settlement really only arises when a claim is made to the fund, the husband, in this case, would be prevented from making a claim by this right of retainer against him. But I think there is a fallacy in that argument, because, of course, the right of retainer may or may not be exercised, and the husband may make his claim. Then the wife may say, "I assert my right to an equity to a settlement." Then the executors may say, "We, on our part, as against anything belonging to

(1) 1 De G. & Sm. 644. (2) 9 Hare, 432.

the husband, assert our right as against the husband to be paid the debt which he owes to the estate of the testator."

However, that is a matter which has been the subject of many decisions. I have here the text-book which is always referred to in cases of this kind, namely, *Williams* on Executors; and I find that the law is there stated thus (1): "At law, a legacy to the wife is a legacy to the husband: but in equity, where a legacy is given to a married woman, . . . the property is subject to the claim of the wife, for a provision out of it for herself and children." In *Lady Elibank* v. *Montolieu* (2) the law is thus stated in the marginal note: "Upon the bill of a married woman, entitled to a share of the personal estate as one of the next of kin of the intestate, against her husband, and the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the husband to him, it was declared he was not entitled to retain; but that the plaintiff's share was subject to a farther provision in favour of her and her children; the settlement on her marriage being inadequate to the fortune she then possessed; and it was referred to the Master to see a proper settlement made on her and her children; regard being had to the extent of her fortune and the settlement already made upon her."

The case that is exactly in point is the case of *Carr* v. *Taylor* (3), where the wife claimed, under her equity, a settlement out of a share of personal estate coming to her as one of the next of kin of an intestate, and the administratrix of the intestate against whose estate she made the claim sought to set off a debt from the husband to the intestate's estate. There had been in that case a settlement by the husband in consideration of the portion or fortune which he would have or receive upon his marriage. The settlement was an ante-nuptial settlement, expressed to be in consideration of the portion or fortune which the husband would have or receive upon his marriage with the intended wife, and he made a settlement of property of his own. The share of the intestate's estate accrued to the wife after the marriage; and the Master of the Rolls, Sir *William Grant*, in

(1) 6th Ed. p. 1214.

(2) 5 Ves. 737.

(3) 10 Ves. 574.

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giving judgment, said (1): "The doubt in this case is, whether the husband ought to be considered a purchaser of the whole fortune of his wife, or only of that, which he was actually to receive with her at the marriage. If he was a purchaser of the whole, she is not entitled to any provision out of what has since accrued: if he was not a purchaser of the whole, she will by the rule of this Court be entitled to an additional provision out of that additional fortune. The rule is established, that, to make the husband a purchaser of the whole, the settlement must either express, or clearly import, that intention. This settlement does not express that intention, or clearly import it; and the meaning seems to to be, that the husband should take only what was to become his immediately upon the marriage. It is not alleged, that the provision he made for her was more than adequate to that fortune. With regard to the claim of set-off, made by the administratrix of *Taylor*, upon the ground, that the plaintiff's husband was indebted to the estate of the intestate, whatever controversy there might have been upon the right of the husband to sue in his own name for the legal *choses in action* of his wife, he could not sue for this fund without joining her; and, if he had obtained a decree for it in her right, and died, before he had reduced it into possession, it would have survived. This is a case, therefore, in which there can be no set-off for the debt of the husband." In that case the bill was filed by the married woman seeking actively to have the settlement of the property made. As far as I can gather, the husband was living, and his assignees in bankruptcy were parties to the action.

Then the matter came before Lord *Selborne*, when sitting for the Master of the Rolls, in the case of *In re Batchelor* (2), where the marginal note is this:—"A married woman, whose husband was indebted to a testator, having become entitled under his will to a legacy in reversion not limited to her separate use, joined with her husband in assigning it to *L.* for value, by deed duly executed and acknowledged by her under the 20 & 21 Vict. c. 57"—that is, Vice-Chancellor *Malins' Act.* "On the reversion falling in, the executors of the testator claimed to be entitled to retain the amount of the debt out of the legacy:

(1) 10 Ves. 579. (2) Law Rep. 16 Eq. 481.

Held, that there was no right of retainer, and that *L.* must be paid in full."

Lord *Selborne* said this (1): "The general law of the Court is, that a legatee, who is also a debtor to the testator's estate, cannot (unless an intention that he should do so is manifested by the will) claim payment of his legacy without paying the debt; and therefore that the executors may, in such a case, retain the debt out of the legacy, when payable. 'It may be observed' (says Sir *E. V. Williams* in his work on the Law of Executors (2)), 'that the term "set-off" is somewhat inaccurately used in cases of this kind. The proper use of that expression seems applicable only to the mutual demand of a debtor and creditor. A right of this nature is rather a right to pay out of the fund in hand, than a right of set-off, and such right of payment can only arise where there is a right to receive the debt so to be paid; and the legacy or fund so to be applied in payment of the debt must be payable by the person entitled to receive the debt.' A legacy given to a married woman, but payable by law to her husband, is in the same position, for this purpose, as a legacy to the husband himself. Inasmuch, however, as the husband's right is subject to the wife's chance of survivorship, as long as the legacy is reversionary, and to her equity to a settlement when it becomes vested in possession during the marriage, the right of retainer for the husband's debt is also subject to those rights; and it would seem to be most consistent with sound principle that every right and power of the wife, as distinct from her husband, ought, in such a case, to prevail over the claim of retainer for the husband's debt."

I therefore do not hesitate to say that the wife's equity to a settlement is prior to the right of retainer by the executors for the husband's debt, and I confess my own opinion agrees completely with that of Lord *Selborne* to which I have referred; because after all, although it is said that the legacy to the wife is a legacy to the husband at law, yet the husband's right is strictly limited. The legacy is a legacy to the wife; the husband takes it in right of the wife; and in a case like this it is clear, as was pointed out in *Carr* v. *Taylor* (3), that the husband could only sue

(1) Law Rep. 16 Eq. 483. (2) 7th Ed. p. 1305.
(3) 10 Ves. 574.

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for it by joining the wife. Of course I am dealing with this case as a case which, as I am told, does not come within the *Married Women's Property Act*, 1882. If the wife dies before the husband has reduced the legacy into possession, I think it is equally clear that the husband must take out administration to the wife. Therefore it seems to me to be reasonable to say that, in a case of this kind, the right of the wife is a right as between her and the husband which attaches in priority to the right of retainer for the debt of the husband on the part of the executors or administrators of the deceased from whom or from whose bounty the wife derives this advantage. Consequently I hold that the right of retainer in this case is subject to the wife's equity to a settlement. Of course this equity would be perfectly valid and might be enforced as against any part of this fund which belonged to the husband.

Then the question arises, How much of this fund ought, under the circumstances, to be settled? The circumstances, as I understand them, are these. The wife is entitled to some £70 a year for her life under a provision made for her by some one else; it does not appear (as I have before said) whether for her separate use or not. There was no settlement upon her marriage. There are six children of the marriage. The wife has been for some years partially paralysed, and the husband is a man in a very small way of business. He seems to be indebted to this testator's estate to the amount of £750, which there does not appear to be much chance of his being able to pay, as he is making, it is said, only some £60 a year by his business. I must look, no doubt, at all the circumstances, and I do not forget amongst those circumstances that whatever may be settled in this case upon the wife will diminish to that extent the fund which will be coming to the other residuary legatees. Her claim really is a claim which will affect them considerably. But, upon the whole, not disregarding that circumstance, I think I must order £500 of this fund to be settled upon the wife, and I direct it to be settled in this way—the settlement being made by the declaration of the Court now:—Declare that £500 of this fund ought to be settled on the wife for her life for her separate use without power of anticipation, and after her death the capital to go

to her children as she may appoint by will, and in default of appointment to her children who, being sons, may attain the age of twenty-one years, or being daughters, may attain that age or marry. In default of such children of course the fund will belong to the wife. As to the rest of the fund, if there be any remaining, it ought, in my opinion, to be retained by the executors *pro tanto* against the husband's debt and applied by them for the benefit of the other residuary legatees, excluding the wife.

The fund may be paid into Court, if thought desirable, or the trustees may retain it in their hands on the trusts I have declared.

There is one thing I have omitted to mention in giving judgment. I ought to have noticed the case of *Knight* v. *Knight* (1), before Vice-Chancellor *Hall*, which seems at first sight to be contrary to the authorities of *Carr* v. *Taylor* (2) and *In re Batchelor* (3) which I have cited. In *Knight* v. *Knight* the debt which it was sought to set off was a debt due from the husband as executor. He himself was the executor, and received assets of the testator who had given the legacy to his wife. He being indebted as executor, the wife sought to have her legacy nevertheless settled upon her, and it was held that no equity to a settlement arose. These other cases were not cited there, but I cannot for a moment imagine that they were not present to the mind of such an accomplished Judge as Vice-Chancellor *Hall;* and, therefore, I presume he thought that some difference must have arisen from the fact that the debt in that case was not a debt due to the testator in his lifetime, but was a debt due from the husband as executor of the testator. At present I do not appreciate the difference myself, but I cannot treat it at all as an authority which would in any way overrule the cases of *Carr* v. *Taylor* and *In re Batchelor*, both of which cases were decided before it.

The order, so far as is material, was settled in the following form:—

"This Court doth declare that out of the share of the Defendant *Sarah Shackel* in the estate of the testator, *Robert Briant*, deceased, £500, or the

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(1) Law Rep. 18 Eq. 487. (2) 10 Ves. 574.
(3) Law Rep. 16 Eq. 481.

KAY, J.
1888
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whole of her share, if less than that sum, ought (subject to the payment of costs as hereinafter directed) to be settled for the benefit of the said *Sarah Shackel* and her children, as follows, that is to say: Upon trust for the said *Sarah Shackel* during her life for her separate use without power of anticipation; and, subject thereto, upon trust for such of the children of the said *Sarah Shackel*, whether by her present or any future husband, as she shall appoint by will; and, in default of appointment, in trust for her said children, being a son or sons, at the age of twenty-one years, or, being a daughter or daughters, at that age or on marriage under that age, and, if there shall be more than one of such children then as tenants in common in equal shares: and in default of any children of the said *Sarah Shackel* attaining a vested interest, in trust for herself: and that the balance (if any) of her share to which her husband, the Defendant *Edward Shackel*, is entitled is to be set off *pro tanto* against the debt due from him to the testator's estate and forms part of the residue payable to the residuary legatees under the testator's will other than *Sarah Shackel*." Costs to be taxed, and to be retained by the Plaintiffs out of any trust funds in their hands. Order on the Plaintiffs, within ten days after Taxing Master's certificate, to "lodge in Court £500, or the whole of the share of *Sarah Shackel* (after payment of costs) if less than £500." Division of "ultimate residue" among testator's other five children, one-fifth to be invested in the names of the Plaintiffs and the income thereof to be paid to the Defendant, Mrs. *Shepherd*, for her life.

Liberty to apply.

Solicitors: *Reep, Lane, & Co.; Soames, Edwards, & Jones; Marshall & Haslip*, agents for *Beale & Martin, Reading.*

G. I. F. C.

KAY, J.
1888
June 18, 19, 27.

In re ROPER.
ROPER *v.* DONCASTER.

[1888 R. 448.]

Married Woman—Contract—Debts—General Power of Appointment—Testamentary Appointment—Appointed Fund—"Separate Property"—Married Women's Property Act, 1882, *s.* 1, *sub-s.* 4.

An appointment by a married woman by will, in exercise of a general power of appointment by deed or will, or by will only, does not make the appointed property liable to engagements entered into with her on the credit of her separate estate prior to the 1st of January, 1883, the date of the commencement of the *Married Women's Property Act*, 1882, sect. 1 of the Act applying only to contracts made after that date.

In 1881 a married woman concurred with her husband in a mortgage, and thereby covenanted with the mortgagees, "with the intent to bind her separate estate," that she or her husband would pay the interest on the mortgage debt, and she assigned a life-policy to which, under the *Married*

Women's Property Act, 1870, she was entitled for her separate use, to the mortgagees as security (with other property belonging to and assigned by the husband) for the mortgage debt and interest. Subsequently, by another deed dated in 1881, certain prior mortgage debts on the husband's property were transferred to the same mortgagees, the married woman being a party, with her husband, to the transfer, and covenanting, "with the intent to bind her separate estate," for payment by her or her husband of the interest on the several mortgage debts so transferred. The married woman joined in the mortgage and transfer only as surety for her husband.

By a separation deed, dated in 1884, the married woman covenanted with her husband to pay the interest on the several mortgage debts. At the dates of the three deeds she had, besides separate estate consisting of the said policy and some furniture, a general power of appointment by will over a fund. In 1887 she died, leaving her husband surviving, and having by will appointed the fund to her infant daughter absolutely at twenty-one or marriage:—

Held, that the appointed fund was not liable to satisfy the married woman's obligations with the mortgagees, since (1) such obligations were incurred before the commencement of the *Married Women's Property Act*, 1882; and (2) the exercise of the power did not make the appointed property liable as assets of the appointor because such obligations were not strictly speaking debts:

Semble, even if the married woman's obligations had been incurred since the commencement of the *Married Women's Property Act*, 1882, the fund would not have been liable as "separate property" of the married woman within sect. 1, sub-sect. 4.

Mayd v. *Field* (1) considered.

BY an indenture of mortgage, dated the 28th of March, 1881, and made between the Defendant, *Sydney Roper*, of the first part, *Annie Roper*, his wife, of the second part, and three persons therein named (thereinafter called "the mortgagees") of the third part; after reciting that the said *Annie Roper* was absolutely entitled for her separate use, according to the provisions of the *Married Women's Property Act*, 1870, to the policy of assurance thereinafter mentioned, it was witnessed that, in consideration of £1000 to the said *Sydney Roper* paid by the mortgagees at the request of the said *Annie Roper*, the said *Sydney Roper* covenanted with the mortgagees to pay to them, on the 28th of September, 1881, the sum of £1000, with interest at 5 per cent. per annum; and also, if and so long as the said £1000 should remain unpaid after that day, to pay interest at

(1) 3 Ch. D. 587.

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the same rate half-yearly. And the said *Annie Roper*, "with the intent to bind her separate estate," also covenanted with the mortgagees that, so long as the said £1000 should remain owing, she or her husband would pay interest thereon at the rate aforesaid. And by the same indenture the said *Sydney Roper* assigned (subject to certain then subsisting mortgage debts) certain reversionary and other interests to which he was entitled; and the said *Annie Roper* assigned the said policy of assurance for £1000, to which she was entitled for her separate use in the event of her dying in the lifetime of the said *Sydney Roper* (which event happened) to the mortgagees by way of security for the said mortgage debt of £1000 and interest. And it was thereby declared that, notwithstanding as between the said *Sydney Roper* and *Annie Roper*, the latter might be a surety only for the former, yet, as between the mortgagees and the said *Annie Roper*, she and the policy assigned by her should be deemed a principal debtor and security for the mortgage debt and interest.

By an indenture dated the 10th of May, 1881, the prior mortgage debts subsisting on the properties mortgaged by the said *Sydney Roper* under the last-stated indenture, were transferred to the said mortgagees, the said *Annie Roper* being a party to the deed, with her husband, and thereby covenanting, with the transferees, "with the intent to bind her separate estate" for payment by her or her husband of the interest on the sums for the time being due on the several securities. And the transfer contained a surety clause similar to that in the above-mentioned mortgage.

By a separation deed dated the 22nd of September, 1884, executed between Mr. and Mrs. *Roper*, after reciting that they had agreed to live separate, the latter covenanted with her husband (amongst other things) to pay the interest on his said several mortgage debts.

At the respective dates of the three indentures above mentioned the only property to which Mrs. *Roper* was entitled for her separate use without restraint upon anticipation consisted of some household furniture of the value of about £200 and the said policy of assurance for £1000; but she had a general power of appointment, by will only, over about £10,000 under her grandfather's will, and also over a sum of £2400 under a deed-

poll dated in 1876, but as to the latter power in the event only of the Plaintiff, *Evelyn Roper*, the only child of her marriage, dying under twenty-one without having been married. Mrs. *Roper* died on the 10th of July, 1887, leaving her husband surviving, and thereupon the above-mentioned mortgagees received the £1000 on her life-policy in reduction of the mortgage debt due under the mortgage of the 28th of March, 1881.

By her will dated the 31st of May, 1873, Mrs. *Roper* exercised her said testamentary powers of appointment by, in effect, appointing the trust funds subject to those powers to her daughter, the Plaintiff, absolutely, on attaining twenty-one or marrying, subject to an annuity of £250, which she appointed to her husband for his life upon certain conditions. By a codicil she bequeathed all her residuary estate to her executors upon trust to convert into money, and thereout to pay her debts, funeral and testamentary expenses, and to hold the balance upon the trusts thereinbefore declared concerning the moneys over which she had a power of appointment.

The principal question—raised by an originating summons by Mrs. *Roper's* daughter and only child, against Mrs. *Roper's* executors, Mr. *Roper*, and the mortgagees—was whether the property appointed by Mrs. *Roper's* will was liable to satisfy her covenants contained in the mortgage and transfer.

G. B. Freeman, for the Plaintiff, submitted that the mortgagees were not entitled to any charge on the appointed funds.

Borthwick, for the Defendants, the executors of Mrs. *Roper*.

Gaselee, for the Defendants, the mortgagees:—

The funds appointed by the will of Mrs. *Roper* are applicable to satisfy her covenants in the mortgage and transfer. It is well settled that an execution of a general power of appointment by a man or a *feme sole* makes the property subject to his or her debts; and in the same way the execution of such a power by a *feme covert* makes the property subject to her engagements.

[KAY, J., referred to *Vaughan* v. *Vanderstegen* (1).]

That case has not been followed: *London Chartered Bank of*

(1) 2 Drew. 165.

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Australia v. *Lemprière* (1); *In re Harvey's Estate* (2). The latter case exactly covers the present, for there property over which a married woman had a power of appointment by will, which she exercised, was held to be liable to the payment of her debts.

[KAY, J., referred to *Ex parte Gilchrist* (3).]

Holmes v. *Coghill* (4) shews that the principle is that equity aids creditors, and that the principle is applicable to real as well as personal estate, and does not, therefore, depend on the fact that the property passes through the hands of the appointor's executors. The appointee is in the position of a trustee for the creditors of the appointor.

[He referred also to *Johnson* v. *Gallagher* (5).]

[KAY, J., referred to *Sockett* v. *Wray* (6), *Pike* v. *Fitzgibbon* (7), and *In re Lady Hastings* (8).]

Lord Townshend v. *Windham* (9) and *Mayd* v. *Field* (10) are also authorities in favour of my contention.

Field, for the Defendant, Mr. *Roper*.

Freeman, in reply:—

In re Harvey's Estate was mentioned with disapproval in *Pike* v. *Fitzgibbon* (11).

His LORDSHIP reserved judgment on the above point; but, on a second point which was raised, namely, whether Mrs. *Roper* had joined in the mortgage and transfer as principal debtor or only as surety for her husband, held that she was in the position of surety only.

KAY, J. (after stating the facts, continued):—

The question is whether the funds appointed by Mrs. *Roper's* will have become liable to satisfy her obligations under her covenants with the mortgagees.

(1) Law Rep. 4 P. C. 572.
(2) 13 Ch. D. 216.
(3) 17 Q. B. D. 521.
(4) 7 Ves. 499; 12 Ves. 206.
(5) 3 D. F. & J. 494, 513.
(6) 4 Bro. C. C. 483.
(7) 17 Ch. D. 454.
(8) 35 Ch. D. 94.
(9) 2 Ves. Sen. 1.
(10) 3 Ch. D. 587.
(11) 17 Ch. D. 454, 466.

The *Married Women's Property Act*, 1882, commenced on the 1st of January, 1883.

On the 28th of March, 1881, it was decided in *Pike* v. *Fitzgibbon* (1) that the only separate estate of a married woman which could be made liable for her engagements was such as she had "at the time of contracting the debt or engagement."

Sect. 1, sub-sect. 4, of the Act of 1882 altered this by providing thus: "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Grammatically, this plainly refers only to contracts made after the commencement of the Act, otherwise the words would have been, "which she was or is possessed of, &c." Moreover, it is part of a section which increases the future capacity of a married woman to make contracts. To hold that it was intended to alter the effect of contracts already made would, in my opinion, be an unreasonable and violent construction, and one which the Court ought not to adopt without very express words.

I therefore hold that this case does not come within the provisions of the *Married Women's Property Act*, 1882.

If it did, the question would be whether the fund appointed ever was the separate property of the married woman.

It was held in *Ex parte Gilchrist* (2), by all the Judges of the Court of Appeal, following many previous authorities, that such a power, although general and even if exercisable by deed or will, is not itself property at all. But it is argued that, although the power itself is not property, yet that the exercise of such a power makes the property assets of the appointor, and that accordingly the property thereby appointed became liable for her debts.

There is no doubt that, in case of a man who has a general power of appointment and exercises it by will in favour of volunteers, the property so appointed will be considered as assets for the payment of his debts. And this doctrine was applied by Lord *Hardwicke*, in *Lord Townshend* v. *Windham* (3), to the exercise of a general power even when exercised by deed so as to take

(1) 17 Ch. D. 454. (2) 17 Q. B. D. 521. (3) 2 Ves. Sen. 1.

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effect on the death of the appointor; his Lordship saying (1): "In respect of his creditors it must be considered as part of his estate at the time of his death; he having executed it so as to gain the interest to himself, and attempted to pass it at the same time to his daughter: the Court will not suffer it; saying he has been guilty of a fraud as to them, being indebted at the time." This decision proceeded upon the statute 13 Eliz. c. 5.

In *Holmes* v. *Coghill* (2) Sir *W. Grant* treats the doctrine as settled, where the appointment by will has been actually made: and there is a note (3) of the decree in *Bainton* v. *Ward* (4), before Lord *Hardwicke*—a case in which such a power was exercised by will: and it was thereby declared that the fund appointed was to be considered part of the testator's personal estate liable to the satisfaction of his debts.

But does this law apply to the case of a married woman? It would be strange if, before the *Married Women's Property Act*, 1882, the law was that only the separate property which a married woman had at the time should be liable, to the exclusion of separate property acquired afterwards, but that, nevertheless, the exercise by will of a general power of appointment would make the appointed fund, which never was her separate property, liable. Even if it could be said to become her separate property by the appointment, this would only be so at her death, long after the engagements were entered into; and therefore, according to *Pike* v. *Fitzgibbon* (5), the appointed property could not be made liable.

Suppose she had a general power to appoint by deed or will, and exercised it by deed to take effect upon her death, would Lord *Hardwicke's* decision, to which I have referred, apply and make the appointment void against her creditors, or rather make it an appointment for their benefit under 13 Eliz. c. 5? Or suppose she survived her husband and exercised the power by will after his death, would the property then become liable for her engagements during coverture? I think not; and these illustrations make the fallacy apparent. A married woman could not contract debts like a person completely *sui juris*. Her engage-

(1) 2 Ves. Sen. 11.
(2) 7 Ves. 499.
(3) 7 Ves. 503.
(4) 2 Atk. 172.
(5) 17 Ch. D. 454.

ments only bound her to the extent of her separate property at the time, which property might be reached by judgment and execution. It follows that when she afterwards exercised the general power, whether by deed or will, she had no debts which could be made available against it.

In *Vaughan* v. *Vanderstegen* (1), where a married woman exercised a general power of appointment by will, it was held by Vice-Chancellor *Kindersley* that the property appointed was not liable for her engagements, because (2) "a contract for the payment of money made by a married woman having separate estate, though called a debt, is only a debt *sub modo*."

This was followed by Lord *Romilly* in *Hobday* v. *Peters* (3), where the power of appointment was by deed or will but was exercised by will.

The same point was decided in *Blatchford* v. *Woolley* (4) and *Shattock* v. *Shattock* (5). The last case was dissented from in the judgment of the Privy Council in *London Chartered Bank of Australia* v. *Lemprière* (6), upon the ground that *Norton* v. *Turvill* (7), *Sockett* v. *Wray* (8), *Heatley* v. *Thomas* (9), and *Johnson* v. *Gallagher* (10) had established that where a married woman, having a power to appoint by deed, gave a bond, that bond was payable out of the fund which was subject to the power. But it has recently been pointed out in *In re Lady Hastings* (11) that these decisions proceeded upon a misapprehension of *Norton* v. *Turvill*, which really decided that the bond was an exercise of the power of appointment, a doctrine which, as Lord Justice *Turner* said in *Johnson* v. *Gallagher* (12), is now exploded.

In *In re Harvey's Estate* (13), Vice-Chancellor *Hall* held that, where the power was only by will and was exercised, the property was liable for the appointor's debts.

This last case seems to have been followed in *Hodges* v. *Hodges* (14).

(1) 2 Drew. 165, 363.
(2) Ibid. 184.
(3) 28 Beav. 354.
(4) 2 Dr. & Sm. 204.
(5) Law Rep. 2 Eq. 182.
(6) Ibid. 4 P. C. 572, 594.
(7) 2 P. Wms. 144.
(8) 4 Bro. C. C. 483.
(9) 15 Ves. 596.
(10) 3 D. F. & J. 494, 515.
(11) 35 Ch. D. 94.
(12) 3 D. F. & J. 494, 519.
(13) 13 Ch. D. 216.
(14) 20 Ch. D. 749.

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In *Mayd* v. *Field* (1), the power was by deed or will; and, subject thereto, the property was settled to the separate use of the married woman for life, and if she survived her husband (which happened), then for her absolutely. During her coverture she exercised her power by will. The property was treated by the late Master of the Rolls as though it was altogether the separate property of the married woman; that is to say, the *corpus* of property which is settled to the general appointees by deed or will of a married woman, and, in default of appointment, to her separate use during her life, and if she survives her husband to her absolutely, was treated as her separate property in case she should so survive. Would it be her separate property if she did not survive—in which case the limitation was, I understand, to other persons? The separate use during her life would only enable her to bind her life interest. An engagement, though by bond, would not be an exercise of her power. The reversion which was contingent on her surviving her husband was not limited to her separate use.

The cases relied on by the Master of the Rolls proceed upon a misapprehension of the earlier decisions, which treated the bond of a married woman as an exercise of her power to appoint by deed.

With respect to this it was decided by Lord *Cottenham*, in *Owens* v. *Dickenson* (2), that a contract in writing of a married woman to pay a sum of £210 could not be treated as the execution of a power to appoint "by any deed or other instrument in writing," Lord *Cottenham* saying (3), "Now that document alone, within the authority of cases which have been decided, would have been operative upon her separate estate, but not by way of the execution of a power, although that has been an expression sometimes used, and, as I apprehend, very inaccurately used, in cases where the Court has enforced the contracts of married women against their separate estate. It cannot be an execution of the power, because it neither refers to the power nor to the subject-matter of the power; nor, indeed, in many of the cases, has there been any power existing at all. Besides, as it was argued in the case of *Murray* v. *Barlee* (4), if a married woman

(1) 3 Ch. D. 587.
(2) Cr. & Ph. 48.
(3) Cr. & Ph. 53.
(4) 3 My. & K. 209.

enters into several agreements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid *pari passu;* whereas, if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear, therefore, that there is nothing in such a transaction which has any resemblance to the execution of a power."

It was with reference to this decision that Lord Justice *Turner* said in *Johnson* v. *Gallagher* (1), "The doctrine of appointment seems to me, however, to be exploded .... and it is scarcely less clear that the transactions do not create any lien or charge on the separate estate;" and he decided, as is well known, that the separate estate of a married woman is made liable for her engagements simply by a process of equitable execution—a decision which has settled the law upon this point and has been acquiesced in ever since.

My opinion is that, in cases not within the *Married Women's Property Act*, 1882, whether the power of appointment be by deed or will, or by will only, an appointment by the will of a married woman does not make the property appointed liable to engagements entered into with her on the credit of her separate estate.

What may be the law as to cases falling within that Act, I express no opinion, save this—that to make property appointed by the will of a married woman liable to her engagements under that Act, it seems necessary to hold that the appointment by her will makes the property appointed her separate property, because it is only "All separate property which she may thereafter acquire," which is by that Act rendered liable.

In this case the powers of appointment were only by will; and as the provision of sect. 1, sub-s. 4, of the *Married Women's Property Act*, 1882, does not apply, in my opinion the property appointed by her will is not subject to her engagements made during her coverture.

Solicitors: *P. Hodgkinson*, for *Pratt & Hodgkinsons, Newark; W. J. Mitton; Field, Roscoe & Co.; T. R. Kent*, for *Pratt & Hodgkinsons, Newark.*

(1) 3 D. F. & J. 519.

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In re ST. STEPHEN, COLEMAN STREET.
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Charity—Advowson—Rectory—Perpetual Curacy—Parishioners, Trust for—Right of Presentation — Vicarage-house— Charitable Trusts—"Charity Property" — Practice — Petition—Test Case—Costs—Appeal—"Special Leave"—City of London Parochial Charities Act, 1883, *ss.* 5, 10.

Under a Crown grant in 1589 an impropriate rectory in the city of *London*, and also the parish church and the advowson, were vested in trustees for the benefit of the parish, the vicar being always chosen by the parishioners. A vicarage-house was provided by a benefaction in a will dated in 1722, and had since been held by trustees on trusts for the benefit of the parish :—

Held, that the advowson and house were "charity property" within the *City of London Parochial Charities Act*, 1883; and a petition presented, as a test case under sect. 10, by the several trustees for a declaration that they were not "charity property," was dismissed with costs, the Court refusing to sanction an arrangement between the various parishes affected by the decision for payment of the Petitioners' costs out of the charity estates.

"Special leave to appeal" under sect. 10 was also refused, on the ground that such leave should only be given where the Judge considered the question raised by the petition to be doubtful.

Dictum of *Jessel*, M.R., in *Attorney-General* v. *Webster* (1) dissented from.

Attorney-General v. *Parker* (2) discussed.

BY letters-patent, dated in 1589, Queen *Elizabeth*, in consideration of the sum of £399 12*s.*, granted to four persons therein named the rectory and church of *St. Stephen, Coleman Street*, in the city of *London*, with the appurtenances, and tenements, tithes, and hereditaments thereto belonging (subject to a lease for twenty-one years, long since expired), "and also the advowson, gift, free disposition and right of patronage of the vicarage of the church of *St. Stephen*," with its appurtenances, to hold the same unto the said four persons, their heirs and assigns for ever.

The purchase-money of £399 12*s.* expressed to be the consideration for the grant, was provided out of the funds belonging to the parish of *St. Stephen*. The parishioners had exercised the right of presentation to the church from the date of the letters-

(1) Law Rep. 20 Eq. 483. (2) 1 Ves. Sen. 43; 3 Atk. 576.

patent down to the present time. There was not in existence any declaration of trust by the grantees, but the rectory—which was an impropriate rectory—and advowson had been conveyed from time to time from one set of feoffees or trustees to another. The oldest of these conveyances that could now be found was dated in 1676, and purported to be made "in trust for the use and benefit of the parishioners of the parish of *St. Stephen, Coleman Street,*" and the same phraseology was used in some subsequent deeds; but in a conveyance to new trustees dated in 1764, and in the subsequent deeds, the language in which the trust was expressed was altered, as appears by the indenture of the 26th of July, 1881, hereinafter mentioned.

By will, dated in 1722, one *John Rice* bequeathed to his executors £500 in trust to lay out the same in a freehold or leasehold estate of that value, and "to settle or convey the same upon a vicar of some poor parish within the bills of mortality, the income of whose vicarage they should not deem a sufficient competency for his maintenance, and to six of the eldest vestrymen, and the survivors and survivor of them, to the use of the said vicar and vestrymen and their successors for ever."

In 1754, after the death of *John Rice,* the said legacy of £500 was applied by his trustees in rebuilding two houses in *Coleman Street,* then forming part of the parish property, and by lease and release in 1755, one of those houses was conveyed unto and to the use of one *Hutchinson,* his heirs and assigns for ever, in trust to settle and convey the same to and upon the vicar and six of the eldest vestrymen of the said parish of *St. Stephen* to and for the intents and purposes mentioned in the will of the said *John Rice.*

Such house had always been vested in trustees, appointed from time to time, upon the trusts of the said will, and for the vicar for the time being of the parish, as part of the endowment of the vicarage; and it was always occupied by the vicar until the year 1826, from which time the vicar had resided elsewhere, letting the house and receiving the rent in augmentation of his stipend. Since the conveyance of 1755 the house had always been known as "*The Vicarage House.*"

The most recent trust deed relating to the rectory, church, and

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advowson was dated the 26th of July, 1881, whereby "the said rectory and church of *St. Stephen, Coleman Street*, and the advowson, donation, free disposition, and right of patronage to the vicarage of the said parish church," with the appurtenances, were granted to the use of certain persons "upon the same trusts, and for the same uses, intents, and purposes as the same have been hitherto held and enjoyed by the former trustees for the benefit of the said parish of *St. Stephen, Coleman Street*, subject and accountable to the parishioners at a vestry or vestries to be from time to time holden for the said parish," and to the intent that the said rectory, advowson, and premises might not come or vest at any time in any person solely, nor in a less number than six.

By an order made by Vice-Chancellor *Bacon* under the *Trustee Acts* on the 29th of June, 1885, six persons were appointed trustees of the vicarage-house, with the then continuing trustee, and an order was made vesting the house in those seven persons "upon the trusts and to and for the intents and purposes declared concerning the same in and by the said will of the said *John Rice*."

Acting under the provisions of the *City of London Parochial Charities Act*, 1883, the Charity Commissioners in their published "statement," issued under sect. 5, included the advowson and vicarage-house under the head of "Ecclesiastical Charity Property." Thereupon this petition was presented under sect. 10 by the present trustees or feoffees in trust of the rectory, church, and advowson of *St. Stephen*, and by the present trustees of the vicarage-house alleging that, having regard to the circumstances above stated and also to the decree in *Attorney-General* v. *Webster* (1)—by which it was declared that the parish estates of *St. Stephen*, "other than the rectory, advowson, and vicarage-house," were held upon charitable uses—the advowson and vicarage-house were not in any sense charitable property, and could not now be claimed as such. Accordingly the Petitioners prayed a declaration that the advowson and vicarage-house were not "charity property."

In the case of *St. Mary the Virgin, Aldermanbury*, a similar petition was presented by the parishioners of that parish, the

(1) Law Rep. 20 Eq. 483.

question being whether the right of presentation to the "perpetual curacy" of that parish church—which right of presentation was vested in and had hitherto, as in the above case, been exercised by the parishioners, who had acquired their title to the rectory, church, and advowson in 1621—was charity property, but in this case there was no house in question.

It was said that the two petitions were presented as test cases.

The various sections of the *City of London Parochial Charities Act*, 1883, which were referred to in the arguments, will be found set out in a note to *In re St. Botolph's Parish Estates* (1).

Everitt, Q.C., and *E. Ford*, for the Petitioners in *St. Stephen's Case*:—

We submit that, having regard to the decree of Sir *G. Jessel*, M.R., in *Attorney-General* v. *Webster* (2), this advowson and the vicarage-house are not within the *City of London Parochial Charities Act*, 1883. The main question is as to the advowson. Sect. 5 of the Act, which directs the Charity Commissioners to inquire into and classify the property of the *London* Parochial Charities, has reference only to "income" of a charity, and to "property" of a charity which is income-producing property, such as funds. Part III. of the Act, which provides for "schemes for the future application and management" of charity property, shews that the Act is dealing with income-producing property only; and sect. 14, in the same part, referring to the parishes enumerated in the second schedule, including *St. Stephen's* parish, provides for the "administration and management" and the "application" of the "property" of those parishes. The provisions in the Act are altogether inapplicable to an advowson, for it does not produce "income," nor can you "administer," "manage," or "apply" it.

But, further, we say that, on the authorities, an advowson is not a "charity" at all. A right of presentation to a vicarage is not a charitable use: it is not a proper subject of an information, as a charitable trust, though a "pension" for the minister may be: *Edenborough* v. *Archbishop of Canterbury* (3), which dealt

(1) 35 Ch. D. 145, 146. (2) Law Rep. 20 Eq. 483.
(3) 2 Russ. 93.

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with this very advowson; *Attorney-General* v. *Parker* (1); *Attorney-General* v. *Forster* (2); *Attorney-General* v. *Rutter* (3); *Attorney-General* v. *Newcombe* (4); *Fearon* v. *Webb* (5). In *Attorney-General* v. *Webster* (6) Sir *G. Jessel*, M.R., described an advowson as a "mere mode of selecting the charity trustee," the "charitable trust" being the trust for the benefit of the parishioners; and on that theory he reconciles the "anomalous line of cases in which it has been said that an advowson" was not a charitable trust.

[KAY, J.:—What are the "anomalous line of cases" to which the late Master of the Rolls refers? They cannot mean the cases cited in *Attorney-General* v. *Webster*, for those cases do not bear out his statement.]

We submit that the statement is borne out by *Attorney-General* v. *Forster*, *Attorney-General* v. *Newcombe*, and *Fearon* v. *Webb*.

Jeune, Q.C., and *Stuart Moore*, for the Petitioners in *St. Mary's Case*:—

In addition to the cases cited on behalf of *St. Stephen's* parish, we refer to *Lewin* on Trusts (7), where it is laid down that an advowson vested in trustees for the parishioners and inhabitants of a parish is not considered a charitable trust, but to be on the footing of an ordinary trust; and that applications to the Court with respect to it must be made, not by information, but by action.

[KAY, J.:—This is either a public trust, and therefore a charitable trust, or it is a private trust, in which case it is void for perpetuity. It was held by Lord *Hardwicke*, and subsequently, that you cannot by the law of this country have a trust for the general body of parishioners except by way of charity.]

But an advowson seems to have been treated as an exception to the general law of charitable trusts. Advowsons are not within the purview of the Act of 1883, which was evidently framed on the understanding that it was not intended to include

(1) 1 Ves. Sen. 43.
(2) 10 Ves. 335, 342.
(3) 2 Russ. 101, n.
(4) 14 Ves. 1.
(5) Ibid. 13, 19.
(6) Law Rep. 20 Eq. 483, 491.
(7) 8th Ed. pp. 85, 86.

advowsons: had such been the intention it would have mentioned them expressly. The Act refers to property or income which can be "applied" or is "applicable," terms which cannot be used with reference to an advowson. There is no property in a right of presentation: it is a duty rather than a right—a duty to select a proper person as minister. It is not of itself a property: it is of no possible pecuniary advantage to those who exercise it.

Sir *Horace Davey*, Q.C., and *Vaughan Hawkins*, for the Charity Commissioners:—

We say that, in each case, the advowson is a "charity the property or income of which is applicable or applied to or for the benefit of" the particular parish, within sect. 5 of the Act of 1883. As to *St. Stephen's*, what we are dealing with is not an advowson in gross but an impropriate rectory; that is, property held upon a charitable trust, producing money, tithes, &c.; and the advowson is a mere incident to the rectory, that is to say, an obligation on the rector to provide for the service of the church. It is clear that the tithes and glebe lands are subject to a charitable trust; but it is said the advowson is not, and for that proposition *Attorney-General* v. *Parker* (1) and *Attorney-General* v. *Webster* (2) are cited. It is doubtful whether Lord *Hardwicke* so decided in the former case, for there is no such statement in the longer report of his judgment in 3 *Atkyns* (3); and we submit that the law is the other way. From the time of Lord *Bacon* a trust of an advowson for the use or benefit of a parish has been held to be charitable, and a scheme has been made for the regulation of it: *Attorney-General* v. *Scott* (4); S. C. *sub nom. Wilson* v. *Dennison* (5); *Foley* v. *Attorney-General* (6); *Attorney-General* v. *Bishop of Lichfield* (7). The curious theory propounded by *Jessel*, M.R., in *Attorney-General* v. *Webster* was a mere *dictum*, and not a single authority can be produced in support of it. It is clear from the report that his Lordship did not intend

(1) 1 Ves. Sen. 43.
(2) Law Rep. 20 Eq. 483, 491.
(3) Page 576.
(4) 1 Ves. Sen. 413.
(5) Amb. 81.
(6) 7 Bro. P. C. 249.
(7) 5 Ves. 825.

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judicially to decide that the advowson was not held on a charitable trust.

Every trust of a public character for the benefit of a fluctuating class of persons, and not of individuals, is in law a charitable trust: see the decision of the House of Lords in *Goodman* v. *Mayor of Saltash* (1), and of the Court of Appeal in *In re Christchurch Inclosure Act* (2); *In re Botolph's Parish Estates* (3); *In re St. Bride's Parish Estates* (4); *Attorney-General* v. *Hewer* (5). As to the vicarage-house of *St. Stephen's*, there can be no doubt that it is impressed with a charitable trust. It is held upon a trust for the purpose of providing a decent and suitable residence for the vicar. That is a trust "for the benefit of the parish" within sect. 5: it enables the parishioners to make a proper provision for the residence of their vicar.

As to the advowson of *St. Mary's*, the same argument applies as in the case of *St. Stephen's*. That is, in like manner, an advowson appurtenant and not an advowson in gross. It cannot be seriously contended that the Petitioners are, under sect. 10 of the Act of 1883, entitled to these properties "free from any charitable trust affecting the same." If these are not charitable trusts, what are they? No doubt there may be bodies corporate or *quasi*-corporate, such as private clubs, or the Inns of Chancery, which have existed from ancient times, and hold property which is not the subject of a charitable trust; but the distinction in those cases is that, the purposes to which the property is devoted being of a private, and not a public, character, it is competent for the corporators at any time to put an end to them and divide the property amongst themselves. If it is contended that the trust of this advowson is of a private character, the Petitioners must go the length of saying that they can put an end to it at any time. If, on the other hand, the trust is of a public character, it must either be a charity or be void for perpetuity: *Thomson* v. *Shakespear* (6).

[KAY, J., referred to *Gateward's Case* (7).]

(1) 7 App. Cas. 633.
(2) 38 Ch. D. 520.
(3) 35 Ch. D. 142, 153.
(4) 35 Ch. D. 147, n.
(5) 2 Vern. 387.
(6) 1 D. F. & J. 399.
(7) 6 Rep. 59 b.

It is said that these advowsons are not applied "for the benefit of the parish" within the meaning of sect. 5 of the Act of 1883; but the right of the parishioners to present their own clerk must in law be taken to be a benefit to the inhabitants at large.

Everitt, in reply:—

It is clear that the Act was not intended to apply to every charity, but to have a limited scope. Sect. 5 was only intended to embrace charities "the property or income of which is applicable or applied to or for the benefit" of a parish. These advowsons are not "applicable or applied for the benefit" of the parishes, nor do they produce any income which is so applicable or applied.

[He referred to and distinguished the following cases: *Wilson* v. *Dennison* (1); *Edenborough* v. *Archbishop of Canterbury* (2); *Attorney-General* v. *Rutter* (3); *Attorney-General* v. *Webster* (4); *Chilton* v. *Corporation of London* (5); *Earl de la Warr* v. *Miles* (6).]

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The statute 46 & 47 Vict. c. 36 (the *City of London Parochial Charities Act*, 1883), was passed to make provision for the better application and management of the parochial charities of the city of *London*, and it confers certain powers for those purposes upon the Charity Commissioners. Sect. 10 provides that any persons alleging that property which the Commissioners have determined to be charity property within the meaning of the Act is not charitable property, but that they are entitled to the same free from any charitable trust, may apply to the High Court by petition asking for a declaration accordingly. Two such petitions are now before me, which have been argued together as they raise substantially the same question—namely, whether certain advowsons, the presentation to which has hitherto been made by the parishioners of two *City* parishes respectively, are charity property; and in the case of *St. Stephen's* parish, whether a vicarage-house also is charity property.

(1) Amb. 81.
(2) 2 Russ. 93.
(3) Ibid. 101, n.
(4) Law Rep. 20 Eq. 483.
(5) 7 Ch. D. 735.
(6) 17 Ch. D. 535.

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In the case of *St. Stephen's* parish an impropriate rectory was granted by the Crown in 1589, together with the Church of *St. Stephen, Coleman Street*, and all tenements, tithes, and other hereditaments to the same belonging, subject to a lease for twenty-one years, which has long since expired, to four persons named, their heirs and assigns for ever. The purchase-money of £399, expressed to be the consideration for such grant, was provided out of funds belonging to the parish, and the property has been conveyed from time to time to new trustees "for the benefit of the said parish," and the choice of the vicar has been made by the parishioners. The vicarage-house was provided by a benefaction under the will of one *John Rice* in 1722, and was conveyed in 1755 to the then vicar and six vestrymen, and has since been held upon trusts for the benefit of the parish, and has been used by the vicar for the time being.

The facts as to the presentation in the parish of *St. Mary, Aldermanbury*, are substantially the same, the living there being called "a perpetual curacy," and no house being in question. In neither case is the advowson strictly in gross, but it is a part of the rectory and is, properly speaking, an obligation imposed upon the lay rector to provide for the service of the church.

In *Goodman* v. *Mayor of Saltash* (1) the corporation of *Saltash* were the owners in fee simple of a several oyster fishery in the creek of the *Tamar*. The free inhabitants of ancient tenements in the borough from time immemorial, as of right, exercised the privilege of dredging for oysters there. The House of Lords inferred that the corporation held the fishery in trust for these inhabitants, referring their enjoyment to a supposed grant by the Crown upon such trust before legal memory. Lord *Selborne* said (2): "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust: and no charitable trust can be void on the ground of perpetuity": and his Lordship referred to the well-known cases which have established this law. Lord *Cairns* said (3): "A grant of that kind, it appears to me, would be perfectly legal and perfectly intelligible,

(1) 7 App. Cas. 633. (2) 7 App. Cas. 642.
(3) 7 App. Cas. 650.

and there would be nothing in it which would infringe any principle of law. Such a condition would create that which in the very wide language of our Courts is called a charitable, that is to say a public, trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable, that is to say, a public, interest, it will be free from any obnoxiousness to the rule with regard to perpetuities. That is a principle of the Courts which was very well explained in a well-known case in the Court of Chancery which was decided when Lord *Campbell* was Lord Chancellor, a case with regard to *Shakespear's* house, *Thomson* v. *Shakespear* (1). Indeed, it is a principle which has been established in many cases."

In *Thomson* v. *Shakespear* the testator left a sum of money to form a museum at *Shakespear's* house, and a rent-charge to pay the wages of a keeper or guardian. Lord *Campbell* said it was quite clear that it was the intention of the testator that it should exist for ever—that the money should be laid out upon a building that was to stand and be perpetuated in memory of *Shakespear*. "That is a perpetuity and not being a charity it is void."

On the principle stated in these decisions I should think no lawyer would hesitate to say that the trusts in question are charitable trusts, and therefore not open to the objection that they are void as perpetuities.

But it said that Lord *Hardwicke* decided that such a trust of an advowson is not charitable, and that this decision has been recognised by Lord *Eldon* and applied in the case of the parish of *St. Stephen* to this very trust by Sir *George Jessel*, the late Master of the Rolls.

The first case referred to was that of *Attorney-General* v. *Parker* (2), which related to the impropriate rectory of *St. James, Clerkenwell*, in which the service of the church was provided for by a perpetual curate with a pension. The suit was by information seeking to set aside the election of the curate and to estab-

(1) 1 D. F. & J. 399. (2) 1 Ves. Sen. 43.

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lish and settle the right of election. Lord *Hardwicke* refused to set the election aside; and, according to the report in *Vesey*, sen., which contains only a short note of the judgment, he refused to make a decree to settle the rights. His words, as given in the report, are these: "As to the question, whether the Court ought not to make a decree to settle the right, for that, being a charitable use, the information should not be dismissed; the general rule is so, but does not hold here; for nothing is a charitable use here but the pension, which is not in question. But there is no ground to establish this right, as there is no proof or examination entered into of it; nor will the Court, at the suit of a few of the parishioners, put the parish to the expense of an issue to settle a right, which may not come in question in several years. The whole of this information must be dismissed with costs."

A longer report of this judgment is given in 3 *Atkyns* (1). In that version there is not a word as to the right of election not being a charity. The only ground there stated for not settling the right of election is that there was no general allegation what was the right of election, nor so much as an interrogatory framed for this purpose; and the Lord Chancellor refused to direct an issue, because the right might not come in question again in forty years, as the curate might continue to hold it so long. But in *Attorney-General* v. *Forster* (2)—which was again an information relating to *Clerkenwell*—upon a motion for an injunction to restrain the carrying out of a particular election, Lord *Eldon* referred to the previous decision in *Attorney-General* v. *Parker* (3), and also to some notes, which he seems to have had of that case, by Lord *Hardwicke*; but he said he had not been able to find any note of his judgment in detail. Lord *Hardwicke* had said only that he dismissed the information with costs. Lord *Eldon* continued: "But the passages, appearing to be his notes of the argument, particularly at its close, shew his opinion, that it was difficult, if not impossible, to hold, that the information was a due proceeding; for he thought, the only object of an information by the Attorney-General was to secure the revenue of the curate, who was to do the duty, *viz.*, the stipend, between £3 and

(1) Page 576. (2) 10 Ves. 335, 344.
(3) 1 Ves. Sen. 43.

£4; and as to the nomination by the trustee to the bishop, &c., it was all a private suit; as if there had been trustees of an advowson, or any other preferment; the *cestuis que trust* calling upon them to exercise the legal right in them according to the trust; and, I doubt, whether the information was not dismissed upon that principle, as much as upon any other; when it was found, that the election could not be disturbed."

Attorney-General v. *Newcombe* (1) is the report of the hearing of this suit; and in giving judgment Lord *Eldon* said: "There is an intimation in *Vesey* (2), and the fact is unquestionable upon Lord *Hardwicke's* note (speaking of it from recollection), that his Lordship had considerable doubt, whether, regarding the parishioners and inhabitants, whoever answer that description, as *cestuis que trust* of this rectory, having the right to nominate the curate, that is a title, so much in the nature of a charity, that the party would have a right to sue in the name of the Attorney-General; upon the same principle, I presume, as the opinion, expressed in *Attorney-General* v. *Hewer* (3); where the Court said, that, not being a free school, was not a charity." Later on in the same judgment his Lordship refers again (4) to Lord *Hardwicke's* "doubt, whether it is a charity, or a beneficial interest, in the ordinary nature of a right to present."

Attorney-General v. *Hewer* was a case in which a school-house had been erected on the waste. The lord of the manor conveyed it to about eighteen of the principal inhabitants in trust, and to the intent that the inhabitants of *Clapham* might for ever have a school as of his gift. This was held not to be a charity—a decision which shews that the doctrine of trusts for a public varying body, being either charitable or void for perpetuity, cannot have been settled at that time.

In the case before Lord *Eldon* reference was made to a decision of the Court of Exchequer with regard to *Clerkenwell*, which is reported in a note *sub nom. Attorney-General* v. *Rutter* (5). It was an information and bill, the plaintiff seeking a declaration that the election might be established, the Attorney-General by

(1) 14 Ves. 1, 7.
(2) 1 Ves. Sen. 43.
(3) 2 Vern. 387.
(4) 14 Ves. 9.
(5) 2 Russ. 101, n.

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the information asking to have it declared void and to have the future right of election settled. Both information and bill were dismissed as to the election actually made, but directions were given for the manner in which the parish should proceed to make a new election, which could hardly have been proper upon a bill without an information. *Attorney-General* v. *Webster* (1) was an information to have it declared that certain property of the parish of *St. Stephen, Coleman Street*, was held upon charitable trusts, it having been conveyed from time to time to trustees for the use and benefit of the parish, and the income applied in repairs of the church, maintenance of the poor, and for other parochial purposes in aid of the rates. Sir *George Jessel*, M.R., referred to *Attorney-General* v. *Lord Hotham* (2) as an express authority that this was a charitable trust, but he continued: no authority "was wanted because it is impossible for the defendants to make out how you could have a valid trust for the benefit of the parish or for the parishioners for ever without its being charitable; and no suggestion has been made except a reference to that anomalous line of cases in which it has been said that an advowson can be so held." Then his Lordship endeavours to explain the supposed anomaly by saying that in the case of an advowson the parishioners get no individual profit, only a right to nominate their own vicar; "and I think it is possible," he says, "to reconcile that line of cases on this theory, that it is a mere mode of selecting the charity trustee, because the man who performs Divine service and administers to the spiritual wants of the parish is in a sense, and in a grand sense, a trustee for the parish." This far-fetched theory reads rather like the desperate attempts of a lawyer to reconcile the doubt of Lord *Hardwicke* with the law as it is understood at this day. There is no decision that an advowson is exempt from the general law in this respect. Lord *Hardwicke*, if he ever used the words attributed to him in 1 *Vesey* Sen. did but express a doubt. The fuller report in 3 *Atkyns* makes it extremely probable that the report in *Vesey* is in this respect erroneous; and that probability is greatly increased by the following cases.

In *Foley* v. *Attorney-General* (3) the curates of a parish had for

(1) Law Rep. 20 Eq. 483, 491. (2) T. & R. 209. (3) 7 Bro. P. C. 249.

a long time past been appointed by the parishioners. An information and bill was filed to establish their right to make the appointment, and a suit so constituted was entertained, and provisions for the future regulation of the trust were embodied in the order of the House of Lords in the nature of a scheme for the regulation of a charity.

Again, in *Attorney-General* v. *Scott* (1), also reported under the name of *Wilson* v. *Dennison* (2), Lord *Hardwicke* himself entertained an information to establish the election by the parishioners of a minister for the parish of *Leeds*. In his judgment Lord *Hardwicke* treated it expressly as a charity, and said in so many words that the information was not to be dismissed if the charity wanted any direction; and he referred to the case in the House of Lords which I have just mentioned in which he said he had himself been counsel. This was two years after the case of *Attorney-General* v. *Parker* (3), and it is hardly conceivable that he could have intimated that it was not a charity in the one case and held that it was in the other.

These authorities are consistent with the law laid down in such cases as *Attorney-General* v. *Hotham* (4), and the other cases referred to by Lord *Selborne*, and with the judgment of the House of Lords in *Goodman* v. *Mayor of Saltash* (5). No decision to the contrary has been cited, nor has my research enabled me to find any; and in spite of the great weight to be attributed to a supposed doubt of Lord *Hardwicke*, which has been treated with respectful consideration by Lord *Eldon*, I consider myself bound by the authorities to which I have referred to follow my own opinion by holding that an advowson is no exception from the general law as to charitable trusts, and that both these advowsons are held in trust for charity.

As to the vicarage-house, the case is quite clear. There is no authority whatever for treating this as anything but a charitable trust.

Then various questions have been raised upon the statute 46 & 47 Vict. c. 36. It is argued that it only refers to property

(1) 1 Ves. Sen. 413.
(2) Amb. 81.
(3) 1 Ves. Sen. 43.
(4) T. & R. 209.
(5) 7 App. Cas. 633.

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producing income. But the words in sect. 5 are "property or income," which are certainly large enough to include property which does not produce income as well as that which does. It is argued that the words in that section, "applicable or applied to or for the benefit of any parish," cannot refer to an advowson held in trust for the parishioners. I confess I do not see why not. Those words would not be inapt to describe almshouses so held, or a recreation ground, or a well or pump. An advowson held by *A.* in trust for *B.* surely would be applicable for the benefit of *B.* in case he were a private individual; and when *B.* is not a private individual but the inhabitants of a parish, why it is less for their benefit I am totally unable to understand. The further part of sect. 5 shews that the Commissioners are to deal with "ecclesiastical charity property . . . originally given to . . . or for any spiritual purpose which is now a legal purpose, or for the benefit of any spiritual person as such"—words which seem intended to include such charitable trusts as these with which I have now to deal.

The object of the statute, as appears from the preamble, is to make provision not merely for the better application but also for the better management of the parochial charities of the city of *London*. The cases which I have mentioned shew the necessity for this. Applications have been made to the Court of Chancery to direct schemes of management in the cases of trusts of these *City* parochial advowsons. The Court has, as I have pointed out, in some cases entertained such suits and directed schemes. A proceeding of that kind is very costly, which seems to have been one principal reason for Lord *Hardwicke's* refusal so to interfere. It is plain that it was the object of this statute to provide a simpler and less expensive mode of doing this.

For these reasons I am of opinion that the trusts in question are charitable trusts within the meaning of this Act of Parliament, and that these petitions must accordingly be dismissed.

Everitt, Q.C.:—I ask that the Petitioners in the *St. Stephen's Case* may be allowed their costs out of the charity funds. It has been arranged between the several charities affected by the Act that the costs shall come out of their joint estates, these being test cases.

Vaughan Hawkins, for the Commissioners:—I do not ask for costs against the Petitioners, but will leave the question to the Court.

Kay, J.:—I will not encourage persons to come here with petitions of this kind in the hope that they will get costs out of the charity property. I will be no party to paying out of charity property costs which are not properly payable out of it. I refuse both petitions with costs.

Everitt:—I ask for leave to appeal under sect. 10 of the Act, which provides that the decision of a Judge of the High Court on any application under the Act shall be final unless the Judge gives a "special leave" to appeal.

Kay, J.:—I do not entertain the least doubt about the case; my opinion is quite clear and confident upon it. The section only means that leave to appeal may be given where the Judge thinks there is a doubt on the matter. I do not think there is any doubt at all, and therefore I must decline to grant the Petitioners leave to appeal.

Solicitors: *Roche & Son; Wilson & Son; Clabon.*

G. I. F. C.

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Feb. 16, 21, 22, 23.

LAVERY *v.* PURSELL.

[1886 L. 3202.]

Sale of Building Materials—Interest in Land—Statute of Frauds, ss. 4, 17 [*Revised Ed. Statutes, vol. i. pp.* 775, 777]—*Specific Performance—Damages.*

A contract for the sale of "the building materials" of a house—with a condition that all materials were to be taken down and cleared off the ground within two months, "after which date any materials then not cleared will be deemed a trespass and become forfeited, and the purchaser's right of access to the ground shall absolutely cease"—is a contract for the sale of an interest in or concerning land within sect. 4 of the *Statute of Frauds*, and accordingly, from the absence of any sufficient description in the contract of the vendor, avoided.

Marshall v. *Green* (1) considered and distinguished.

Held, also, that the jurisdiction to give damages in substitution for, or in addition to specific performance, has not been extended to cases where specific performance could not possibly have been directed; and, accordingly, the contract, having, from lapse of time, become at the hearing incapable of specific performance, the equitable doctrine of part performance (as avoiding the operation of the *Statute of Frauds*) did not enable the Plaintiff to obtain relief in damages.

Action.

On the 11th of November, 1886, a sale by auction took place by direction of the Defendant *Pursell* of property described in the printed particulars as "the valuable building materials of the spacious premises in *Milk Street, Cheapside*," formerly the *City of London School*, and afterwards the *Constitutional Club*, "comprising the sound brick and stone work, stout timber, joists, partitions and rafters; flooring and joinery; baths and lavatory fittings, cupboards, lifts, ranges, stoves, gas and water piping; stone staircase, York paving and real paving tiles, roofing slates, and many tons of lead." The conditions of sale, so far as is material, were as follows:—

"(2.) The purchase-money to be paid, and contract signed, on the fall of the hammer, and possession of the premises to be then given to the purchaser for the purpose only of taking down and removing the materials.

(1) 1 C. P. D. 35.

"(3.) The materials to be taken down and cleared off the ground on or before the 11th of January next, after which date any materials then not cleared will be deemed a trespass and become forfeited, and the purchaser's right of access to the ground shall absolutely cease."

"(8.) The pulling down and removal of the materials shall be done under the direction of the vendor's architects.

"(9.) On non-compliance by the purchaser with the above conditions, or breach of or non-performance of all or any of them, the contract for sale shall be annulled, and the purchase-money shall be absolutely forfeited to the vendor."

"(12.) The vendor reserves right of access to the premises at all times for himself, and his surveyors and workmen."

At the auction the Plaintiff, by his agent *Tomkins*, bid £565, at which price the property was knocked down to him by the Defendant *Notley*, the auctioneer. *Tomkins* thereupon signed and filled in the contract, which was indorsed in blank upon the particulars and conditions of sale, as follows:—

"I [*R. B. Lavery*] of [88, *Bishopsgate Street, E.C.*] do hereby acknowledge to have purchased by auction this 11th of November, 1886, the materials of the premises described in the within particulars at the price of [£565] subject to the above conditions of sale, which I agree to abide by in every respect.

Charles Tomkins,
Architect,
for *R. B. Lavery, Bishopsgate Street,*
80, *Cornhill, E.C.*"

Notley, the auctioneer, added: "As auctioneer I confirm this sale on behalf of the vendor, and acknowledge the receipt of the purchase-money, £565.

"Dated 11th of November, 1886."

It appeared, however, from the evidence that as a matter of fact the whole £565 was not paid in accordance with the second condition of sale, but that *Tomkins*, the Plaintiff's agent, paid to *Notley* at his office the sum of £100, for which *Notley* signed a receipt prepared by his clerk. This receipt acknowledged the receipt of £100 from *Lavery* "as a deposit on the purchase of

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building materials, *City of London Schools, Milk Street, Cheapside,* for £565," with a note in margin initialed by *Notley*: "Deposit £100, balance to pay £465."

Negotiations were subsequently carried on between *Notley* and *Tomkins* for the purchase by the Plaintiff, or for a lease to him, of the buildings and site, in the course of which the Plaintiff claimed an extension of the time within which, pursuant to the conditions of sale, the building materials were to be removed. This claim was not conceded and the negotiations came to nothing, and in December, 1887, were finally abandoned. In the meantime one *Slugg*, who had been employed and paid 8*s.* 6*d.* a week by *Pursell* to act as caretaker of the premises, was taken into the employ of the Plaintiff and paid by him 13*s.* 6*d.* a week to take care of the premises, possession of which, as the Plaintiff alleged, had been delivered to him by *Pursell* or his agent *Notley* in part performance of the contract, but this was denied on behalf of the Defendants.

On the 17th of December *Notley*, by direction of *Pursell*, wrote to the Plaintiff informing him that the agreement for the purchase of the building materials must be considered as at an end, and returning him the £100 which had been paid as deposit. The Plaintiff had since been excluded from the premises, and was not allowed to remove the building materials.

On the 23rd of December, 1886, the Plaintiff commenced this action against *Pursell* and *Notley* claiming specific performance of the agreement of the 17th of November, 1886; an injunction to restrain the Defendants from preventing him from removing the building materials, and to restrain *Pursell* from himself removing, dealing with, or otherwise disposing of them; or, alternatively, damages against *Pursell*, and damages against *Notley* for breach of his contract that he was authorized by *Pursell* to enter into the agreement and to receive the £100 only by way of deposit in part payment of the purchase-money.

It was alleged by the Plaintiff that the building materials were of great value to him; that he had incurred expense in employing and paying *Slugg* as caretaker, and in employing workmen to pull down and remove the materials. He also relied on part performance on the part of *Pursell*, or *Notley* on his behalf,

in giving up possession of the building by delivering of the keys to *Tomkins* (agent of the Plaintiff) on the 12th of November. Evidence, the result of which is stated in the judgment, was given on both sides at the hearing on the questions of fact, viz., the authority of *Notley* to waive the second condition of sale, and accept £100 on signature of the contract in lieu of the full purchase-money; and the fact of part performance by delivering and taking possession of the premises.

The questions of law argued were whether there was any binding contract between the parties, and if so, whether it was a contract within sect. 4 or sect. 17 of the *Statute of Frauds;* and then whether the Plaintiff was entitled to relief in damages in lieu of specific performance.

Sir *A. Watson*, Q.C., and *D. L. Alexander*, for the Plaintiff:—

Although from the lapse of time the contract cannot now be specifically performed, the Plaintiff is entitled to alternative relief in damages, on the ground that there was a valid binding contract, of which specific performance could have been directed; and damages, for the injury sustained by the loss of the bargain through the caprice or *mala fides* of the Defendant may still be given in lieu of specific performance. The Defendant *Notley* had authority from the Defendant *Pursell*, as his authorized agent, to depart from the conditions of sale by accepting a deposit in lieu of the full amount of purchase-money, and to bind him to the contract entered into on that footing. If *Notley* had not that authority then he is liable to the Plaintiff for the damages occasioned by his misrepresentation: *Warlow* v. *Harrison* (1). The contract being for the sale of building materials only with a view to their severance and removal from the land as chattels, there was not any "contract or sale of lands or any interest in or concerning them," so as to bring the case within sect. 4 of the *Statute of Frauds: Marshall* v. *Green* (2); *Smith* v. *Surman* (3). If not within sect. 4 then the case falls within sect. 17 as a contract for the sale of "goods, wares, and merchandise"; and in that case no memorandum in writing is

(1) 1 E. & E. 295.
(2) 1 C. P. D. 35, 42.
(3) 9 B. & C. 561.

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necessary, as the contract is sufficiently evidenced by acceptance and receipt of a part of the goods sold, and also by payment and acceptance of £100, part of the purchase-money: *Marshall* v. *Green* (1). But if it be held that sect. 4 and not sect. 17 applies, then we rely on part performance as taking the case out of the statute.

Romer, Q.C., and *Hatfield Green*, for *Pursell*:—

There was no binding contract between the parties, as the conditions of sale, which required payment of the whole of the purchase-money "on the fall of the hammer," were not complied with, and *Notley* is not shewn to have had any authority from *Pursell* to waive the condition, and accept a deposit in lieu of the full purchase-money. But if any contract was entered into it was a contract for the purchase of a house, which is an interest in or concerning land within sect. 4 of the *Statute of Frauds*: see *Dart's* Vendors and Purchasers (2); and in that case the contract is invalid, and cannot be enforced, *Crosby* v. *Wadsworth* (3), from the absence of any sufficient identification of the vendor in the contract, which does not in any way name *Pursell*, but contains a mere confirmation by *Notley*, as agent "on behalf of the vendor": *Jarrett* v. *Hunter* (4); *Rossiter* v. *Miller* (5). Even assuming the existence of any agreement of which specific performance could have been originally decreed on the ground of part performance, there is no jurisdiction to give damages when, at the hearing, specific performance has, admittedly, become impossible: *In re Northumberland Avenue Hotel Company* (6).

MacSwinney, for the Defendant *Notley*, supported the argument of the Defendant *Pursell*, and referred to *Child* v. *Stenning* (7).

Sir *A. Watson*, in reply.

CHITTY, J. (after stating that upon the result of the evidence he held that *Notley* had authority from *Pursell* to waive the con-

(1) 1 C. P. D. 35.
(2) 6th Ed. p 234.
(3) 6 East, 602.
(4) 34 Ch. D. 182.
(5) 3 App. Cas. 1124, 1141.
(6) 33 Ch. D. 16, 18; 2 Times L. R. 210.
(7) 5 Ch. D. 695.

ditions of sale to the extent of accepting the lesser sum of £100 by way of deposit in lieu of the full amount of the purchase-money; that a contract in point of fact had been established; and that possession was given under the contract, inasmuch as *Slugg*, the caretaker, remained on the premises with the consent of *Notley*, and, therefore, as *Notley* had authority, with the consent of *Pursell*, the vendor, as the agent of Plaintiff, the purchaser, proceeded):—

* I now come to the serious question of law, whether this contract falls within sect. 4 of the *Statute of Frauds*, as the Defendants contend, or within sect. 17, as the Plaintiff contends. Now, unquestionably sect. 4 of the *Statute of Frauds* has been often considered by the Courts, and I do not think I am wrong in saying that, in part, the section itself has been embedded in the decisions. But it is useful from time to time to refer back to the statute; and the words of sect. 4, so far as is material, are, "any contract or sale of land, tenements, or hereditaments, or any interest in or concerning them." Now the Legislature evidently thought in framing that 4th section that there were some contracts of so important a nature that it was not right to leave them to depend on the slippery testimony of men's memories, and therefore that there should be some note or writing which should be preserved to authenticate the contract; and contracts of this class, that is, of the class as to which I read the words, are within those which in the view of the Legislature required either a contract in writing signed by the parties to it, or some note or memorandum.

What is this contract? On the one side it is said to be a contract merely for the sale of bricks and mortar and stone and building materials; on the other side that it is the sale of a standing house, but a standing house which is not to be retained as a standing house by the purchaser, but one which, standing at the time, is to be pulled down. Quite apart from authority, it would strike any lawyer, first of all, that the house, which is standing on the land, is a tenement or hereditament. I see no escape from it. This house happens to be a very large and important house, and it does seem strange at first sight that the Legislature should protect me if I sell my house as a thing

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standing and not to be taken away, and should require that there should be a note or memorandum of that contract: but that if I sell my house which is now standing, and which is to be pulled down over my head by somebody else, that that should be considered a less important contract, and that no writing should be required. The thing sold, as it stands at the moment, is a hereditament. It is said that there is no interest in a hereditament, but then that is answered, if I am right, in saying that the standing house is a hereditament. Then it is said that there is no interest in the soil. That is true in this sense, and in this sense only, that there is no permanent interest. But in this contract, and in fact in every contract of this kind, there must be, and is here, a right to go in and hold for the purpose of pulling down; and that again seems to be an interest in the hereditament or tenement. I am now speaking quite apart from decision. How can this question be answered, taking the language of the 4th section except that this is a contract concerning a hereditament?

Then it is said that there is a distinction, and that the intention of the parties was to treat the house as a chattel and so bring it within the 17th section. I can understand that, without any difficulty, where the owner of the house is to pull his own house down; but I have the greatest difficulty in following the argument where the purchaser is to pull the house down. Indeed there is, as it appears to me, under this contract, first, a contract concerning a hereditament, and, from the very nature of the thing and the time which must be occupied in pulling down these materials (from the 11th of November to the 11th of January upon the contract, and which upon the evidence is about a reasonable time for so doing), accompanied, as it seems to me, with an interest in the way of licence or possession, which again brings it within the scope of the words of the 4th section. The contract itself speaks, as I have already said, in the second clause, of possession; and that is the language the parties have used. Of course on reading the whole contract, I might see that it is not possession simply in point of law, but something less; but on reading this contract I think possession expresses what the parties meant—namely, it is to be possession, although it is for a limited purpose: it is possession for the purpose of taking down and removing the materials.

The vendor seems to consider himself, according to these terms, to be out of possession, because by the 12th condition he reserved a right of access. It is not necessary to go very minutely into this point, but I think that the contract does purport to confer on the purchaser the right to be there for the purpose of taking down and removing the materials, and does give him either a complete or a qualified possession; but still a possession of the soil itself—of the land, tenements and hereditaments; certainly of the whole of the house. That being so, if the question was free from authority, I should have thought that this case fell within the statute. Of course I am not forgetting the mode in which the property is sold. It is sold as building materials, and if the intention of the parties prevailed it might mean that it is sold as a chattel, but the point still is that it is not a chattel at the time of the sale; and the *Statute of Frauds*, so far as I can see, does not enable parties to say, "We will agree to treat this thing as a chattel," when in point of law it is a hereditament.

Now the authority upon which the Plaintiff relied is *Marshall* v. *Green* (1). In that case the subject-matter of the contract was standing trees, fit to be cut as timber. The intention of the parties unquestionably was to sell and buy as timber. There was no stipulation there in regard to possession, but it was a part of the terms of the contract that the purchaser should cut, and of course part of the terms of the contract that he should enter for that purpose. On the facts it appeared that six trees had been cut down by the defendant, who was sued for the wrongful acts of cutting down the trees. The substantial question was whether the defendant was a trespasser and wrongdoer in cutting the trees, and that depended upon whether he had an enforceable contract to cut the trees. He had cut six trees, and then a notice was given to him by the owner of the trees to cut no more. After that he entered and still cut, and the question was as to his liability in respect of those trees. Sir *Arthur Watson* in arguing this case spoke of a revocable licence, but the Common Pleas Division appeared to consider that this was not a revocable license, because they held that he was justified in cutting the trees notwithstanding the notice. Then the trees being standing

(1) 1 C. P. D. 35.

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trees to be cut by the purchaser, the Court held that it was not within the 4th section. Of course I am bound by the decision itself, and I am bound by any principle of law that is necessary to the decision, but I am not bound by the decision beyond that. Now the Court appears to have considered that there was no interest in the land. I agree that it was a point, if I may say so with great respect, that required a good deal of attention, whether a standing tree is a chattel or can be made by any acts of the parties a chattel. It is a hereditament at the time when the contract is made. It is just as much a hereditament in point of law as a house which is standing on the land and just as much so as the mines which are underneath. I only speak now as a real property lawyer. I am bound of course by the English law to say that a tree is not a chattel. Indeed if a man were indicted for larceny of a tree the indictment would be quashed. I feel a little difficulty in following that reasoning, which, for the purposes of sect. 4, through the intention of the parties, changes the nature of the property from realty to personalty, but I make these observations merely for the purpose of endeavouring to get at the principle on which the decision turns and not for the purpose of making any unnecessary comments on what was said. The Lord Chief Justice says, and I thoroughly agree with him, that it is difficult, if not impossible, to reconcile all the authorities in these matters. He mentions the cases which referred to the *fructus naturales* and the *fructus industriales*, which have no doubt given rise to a considerable difference of opinion, and he quotes the well-known passage in *Williams' Saunders* (1), (*Duppa* v. *Mayo*), where it was said that where the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, the contract is for goods. I pause for one moment to say that I am always myself afraid in dealing with propositions of law to use metaphors. They are very often very convenient, but if pressed too far they often lead to erroneous conclusions. Taking this statement, could the land in the case before me be considered as the warehouse for the building? Why certainly not. Such a contention as that, on the mere statement of it, would be one

(1) Vol. i. p. 395.

which could not be permitted in a Court of Justice. I say that merely to follow the reasoning, but when the case is examined as a whole it will be seen that the judgment turned upon this, that they considered that as the trees were to be cut down as soon as possible, and were almost immediately cut down, the thing sold was a chattel. A point was taken with reference to the statement by Lord Justice *Brett* (1): "With respect to the first point, when the subject-matter of the contract is something affixed to land, the question is whether the contract is intended to be for the purchase of the thing affixed only, or of an interest in the land as well as the thing affixed." I think upon that, that the Lord Justice did not intend to draw any such distinction as to the word commented on—that the tree was affixed or was a fixture. I can see nothing in the argument founded on that proposition. The true basis of his judgment is, I think, to be found in the same page, where he says: "the contract is not for an interest in the land, but relates solely to the thing sold itself."

Though that case may be open hereafter to further consideration, of course I cannot reconsider it, nor can I differ from it. It is evident that if that view is right, which I will assume it to be, a line must be drawn somewhere, because, if this principle were carried to the full extent, there being no distinction between the timber on the land in point of law and the mines, then it would have to be said, following out what the Plaintiff says was the principle of this decision, that a contract for all the coal or minerals under a man's land, with a license to enter and get it, is not within sect. 4. Some explanation why that should be was attempted to be given by Plaintiff's counsel, but without success. The answer perhaps is, that Courts of Justice ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say, "This is a horse's tail," at some time. What I say is that I must draw the line at this case, because on the facts it is quite different, or materially different, from *Marshall* v. *Green* (2), and I leave that case as it stands on its own footing, and must hold that this case comes within the 4th section.

Then there are some more matters to be disposed of. It is said

(1) 1 C. P. D. 42. (2) 1 C. P. D. 35.

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that if it was within sect. 4 there would be part performance, and consequently that the Plaintiff is entitled to succeed. Perhaps I should interpose that being within sect. 4 the Plaintiff cannot succeed on the ground that he has some note or memorandum within that section, because the decisions now have established that a description of the vendor as "vendor" is insufficient; and it is not open to me even to treat that as a question of argument. It is established law that the absence from the note or writing —the receipt or the like—of any description of the vendor, although the term "vendor" may be found in some part of the document, is quite fatal on that point to the Plaintiff's claim.

Now this question of part performance resolves itself into this. Part performance was an equitable doctrine, and, putting it shortly, where there was performance under the contract it took the case out of the statute, but it was an equitable doctrine applied by the Courts of Equity, and it was applied in those cases where the Court would grant specific performance, for instance the case of a sale of land, but if, before the *Judicature Act*, the Court dismissed the bill because it was not a case for specific performance, a Court of Law, when asked to give damages, the contract not being within the 4th section, had no alternative but to refuse and to give judgment for the defendant in the action. But since the various amendments which have taken place in the law with regard to equitable doctrines, it has never been decided, so far as I am aware, that the equitable doctrine of part performance can be made use of for the purpose of obtaining damages on a contract at law. I considered the question carefully in *In re Northumberland Avenue Hotel Company*, and that went to the Court of Appeal (1). There it was impossible to give specific performance, because the subject-matter of the contract had come to an end; the Metropolitan Board of Works had entered, and the claimant—it was in a winding-up—could not claim specific performance. It was in that case argued strenuously on behalf of the claimant that he was still entitled to obtain damages, and I held that he was not (although there had been part performance by entry), and my decision was, as I understand, affirmed by the Court of Appeal.

(1) 33 Ch. D. 16, 18; 2 Times L. R. 210.

The result is that I adhere to that, and I point out that in this case when the writ was issued it was impossible to give specific performance. It was suggested that after *Lord Cairns' Act* the Court of Equity could give damages in lieu of specific performance. Yes, but it must be in a case where specific performance could have been given. It was a substitute for specific performance. It did not give the old Court of Chancery a general jurisdiction to give damages whenever it thought fit, it was only in that kind of case where specific performance would have been the right decree and there were reasons why it would be better to substitute damages, but that could not apply to a case where you could not have given specific performance. As is well known, the Court of Chancery would not grant specific performance of an agreement for a holding for a year, the reason being that it was one of those matters which were best dealt with by damages, and another being the practical reason that you could not get your suit heard and obtain a decree within a year in ordinary course. In this case it is quite plain that the 11th of January was the extreme day on which Mr. *Lavery*, the purchaser, could have remained on the property for the purpose of pulling down and removing. No motion was made, and, as I have said, quite rightly, for no relief of any sort could have been obtained on motion. The 11th of January, 1887, has long since passed, and when this case was opened, it was opened, very properly, as a case for damages and not for specific performance. It would have been impossible to grant specific performance in this case, and that being so, it appears to me that the Plaintiff cannot recover any damages.

Solicitors: *H. Montagu; V. I. Chamberlain; T. G. Bullen.*

F. G. A. W.

CHITTY, J.

1888

May 29.

BAKER *v.* HEDGECOCK.

[1888. B. 2309.]

Agreement in restraint of Trade.

Agreement by *B.*—on entering for a term of three years the service of *A.*, a tailor—not to enter the service or employ of any other person or enter into any engagement or be concerned or interested in carrying on either on his own account or otherwise, "any business whatsoever within the distance of one mile from —— during the continuance of the said term or afterwards during the further period of two years," without *A.'s* consent in writing.

On motion by *A.* to restrain *B.* from setting up as a tailor within the prescribed limit in breach of the agreement:—

Held, that the agreement was void, and that effect could not be given it by rejecting the general restraint, and limiting the agreement for the purposes of the action to carrying on the business of a tailor thereby sought to be restrained.

MOTION for an injunction to restrain Defendant from being concerned in or carrying on either on his own account or otherwise the business of a tailor within the distance of one mile of 61, High Holborn, until trial of the action or further notice.

Plaintiff carried on business as a tailor at 61, *High Holborn*, and in January, 1886, Defendant entered his employ as foreman cutter and general superintendent.

An agreement dated the 23rd of January, 1886, was executed, by which Defendant agreed to serve the Plaintiff at a salary of £5 per week for three years from the 25th of January, 1886, if Plaintiff should so long require him, "and also not to leave the service of Plaintiff or enter the service or employ of any other person or enter into any engagement or be concerned or interested in carrying on, either on his own account or otherwise, any business whatsoever within the distance of one mile of 61, *High Holborn*, or any other place of business of the said employer which he now or hereafter may have, during the continuance of the said term or afterwards during the further period of two years, without the Plaintiff's written consent first had and obtained."

The agreement also contained a proviso that the employer

might determine the service thereby created, without prejudice to the servant's agreement not to be employed by any other person and not to carry on business on his own account thereinbefore mentioned, by giving him one week's previous notice in writing for that purpose.

A quarrel took place, and on the 20th of April last Plaintiff, pursuant to the terms of the agreement, gave Defendant written notice determining the employment. Since this determination of the employment Defendant without Plaintiff's written consent had set up in business as a tailor at 15, *Featherstone Buildings, Holborn*, within 100 yards of 61, *High Holborn*.

In restraint of such business as a breach of Defendant's covenant the present action was brought, and Plaintiff now moved for an injunction.

Stokes, in support of the motion :—

It may be objected that the covenant, being in restraint of "any business whatever," is so wide as to be unreasonable and therefore incapable of being enforced; but we ask the Court to treat the covenant as divisible, and to enforce it to the extent to which it is reasonable, while declining to enforce such part of it as is unreasonable: *Baines* v. *Geary* (1); *Price* v. *Green* (2); *Nicholls* v. *Stretton* (3); *Pickering* v. *Ilfracombe Railway Company* (4).

Plaintiff by his motion seeks only to restrain the carrying on by Defendant of the particular business of a tailor, and it is submitted that the right to this relief is not prejudiced by the fact that the restraint is general, and applies to all business whatsoever.

Vernon R. Smith, contrà :—

The covenant, inasmuch as it prohibits the Defendant from carrying on either on his own account or otherwise "any trade or business whatever," is unreasonable and will not be enforced: *Hilton* v. *Eckersley* (5); *Ward* v. *Byrne* (6).

(1) 35 Ch. D. 154, 156.
(2) 16 M. & W. 346.
(3) 7 Beav. 42.
(4) Law Rep. 3 C. P. 235.
(5) 6 E. & B. 47.
(6) 5 M. & W. 548.

CHITTY, J. 1888 BAKER v. HEDGECOCK.

In the cases cited the unlimited and illegal restraint was capable of being severed from that which was legal, but here the covenant is one and indivisible.

[He was stopped.]

Stokes, in reply.

CHITTY, J.:—

The Plaintiff admits that the restriction sought to be enforced, if the exact words be looked at, is, according to the authorities, one which is unreasonable and therefore void. But it is said that the words by which the Defendant is restrained from carrying on any business whatever within the limits are severable, and can be construed so as to refer to the business of a tailor only, and that the good may thus be severed from the bad, and the good taken while the bad is rejected, rather than that the whole agreement should be treated as void. The principle upon which the Court acts in thus severing the parts of a contract is very neatly stated by Mr. Justice *Willes* in *Pickering* v. *Ilfracombe Railway Company* (1): "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." That statement necessarily involves the proposition that the covenant consists of two parts: for instance, in *Price* v. *Green* (2) a covenant not to carry on a particular business "within the cities of *London* or *Westminster*, or within the distance of 600 miles from the same respectively," was held to be capable of division, and good so far as it related to the cities of *London* and *Westminster*, though void as to the 600 miles. But if the Plaintiff's argument be good, then in every such case the Court could carve out of the unreasonable distance a distance which would be reasonable. Thus if the covenant were, *e.g.*, not to carry on a business in any part of the whole world, the Court would be asked to uphold it by construing it as a covenant not to carry on the business within, say, a limit of two miles, which would in effect be making

(1) Law Rep. 3 C. P. 250. (2) 16 M. & W. 346.

a new covenant, not that to which the parties agreed. In *Price* v. *Green* (1) there were in fact two covenants, or one covenant which was capable of being construed divisibly. The case was accordingly decided in accordance with the principle laid down in *Pickering* v. *Ilfracombe Railway Company* (2).

So too in *Nicholls* v. *Stretton* (3) there were two sets of persons to whom the restriction applied: 1, persons who had been or were clients of plaintiff before and at the time of defendant's entering into the covenant: 2, persons who should thereafter become clients of the plaintiff; and therefore there was no difficulty in severing the two parts of the covenant, which were perfectly distinct, and one of which was reasonable and valid. In *Baines* v. *Geary* (4), as it appears to me—though I am not quite sure whether I read the judgment aright—it was quite possible to divide the covenant into two parts and to enforce it to the extent to which it was reasonable, while declining to enforce such part of it as was unreasonable. The principle of Mr. Justice *North's* decision was that which I have stated, for he refers to and discusses *Price* v. *Green* and *Nicholls* v. *Stretton*, and in fact bases his decision upon those cases. I do not think that he intended to lay down any such principle as that which has been contended for, viz., that the Court can create or carve out a new covenant for the sake of validating an instrument which would otherwise be void.

Motion refused.

Solicitors: *Woodard, Hood & Wells; J. B. Hartley.*

(1) 16 M. & W. 346.
(2) Law Rep. 3 C. P. 250.
(3) 10 Q. B. 346; 7 Beav. 42.
(4) 35 Ch. D. 154.

F. G. A. W.

CHITTY, J.
1888
July 6.

EAST AND WEST INDIA DOCK COMPANY *v.* SHAW, SAVILL, AND ALBION COMPANY.

[1888 E. 702.]

Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 2 [*Revised Ed. Statutes, vol. xii. p.* 14]—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48) [*Revised Ed. Statutes, vol. xvii. p.* 35]—"*Facilities*" *for receiving, forwarding, and delivering of Traffic—Preferential Dock Dues—Railway Commissioners—Jurisdiction—Prohibition.*

The provisions of the *Railway and Canal Traffic Act*, 1854, sect. 2, that railway (and canal) companies shall provide all reasonable facilities for receiving, forwarding, and delivering traffic, and that "no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever"—are limited to the conveyance and transport of traffic on a railway (or canal), and do not give jurisdiction to the Railway Commissioners, on complaint under the *Regulation of Railways Act*, 1873 (36 & 37 Vict. c. 48), s. 6, to restrain a company owning two separate docks twenty miles apart, and a line of railway connected with one of such docks (and thereby constituted a railway company within the *Railway Companies Amendment Act*, 1867), from charging preferential dock dues to the prejudice of one shipowner using the docks, not connected with the line of railway, in favour of other shipowners.

West v. *London and North Western Railway Company* (1) discussed and explained.

Motion.

The question in this case was whether the Railway Commissioners had jurisdiction to deal with an application made to them by *Shaw, Savill, & Albion Co.*, complaining of the scale on which dock dues and shipping rates for the *Tilbury Docks* had been levied upon them by the *East and West India Dock Company* as inequitable and prejudicial, and seeking to restrain the dock company from subjecting the Applicants to the undue prejudice and disadvantage complained of, and from giving to other shipowners an undue preference and advantage over the Applicants. The *East and West India Dock Company* had been authorized by the *London, Blackwall, and Millwall Extension Railway Act*, 1865,

(1) Law Rep. 5 C. P. 622.

and subsequent Acts, to enter into and carry into effect agreements with the *London and Blackwall Railway Company* (now represented by the *Great Eastern Railway Company*) and the *Millwall Canal Company* for the construction, use, and working of an extension railway through the property of the dock and canal companies; it being provided that the management of the line should be subject to the control of the dock company, and also that the dock company should at their option, if they should think fit, have the management of and work so much of the line of railway as passed through or over their lands and properties. Upon a recent application on behalf of a mortgagee for the appointment of a receiver and manager of the dock company's undertaking, Mr. Justice *Chitty* had decided that the dock company was a company within the meaning of sects. 3 and 4 of the *Railway Companies Act*, 1867 (see *In re East and West India Dock Company, Clark* v. *East and West India Dock Company*), and appointed a receiver and manager of the whole company. This decision was on the 9th of May last affirmed by the Court of Appeal (1). In addition to their docks at or near *Millwall* and immediately connected with the railway, the dock company are owners of the *Tilbury Docks* opposite *Gravesend*, which are unconnected with the railway, and twenty-five miles distant from the docks at *Millwall*. The Defendants *Shaw, Savill, and Albion Company* are a shipping company running steamers between the *Tilbury Docks* and *New Zealand*, and on the 19th of June they lodged an application with the Railway Commissioners for the purpose of obtaining an order enjoining the dock company not to subject the Defendants to undue disadvantage in the rates levied upon them on entering, and in respect of their use of, the *Tilbury Docks*, and to desist from giving to other shipowners any undue preference or advantage over the Defendants.

On the 25th of June the Plaintiffs, the dock company, issued the writ in this action for an injunction to restrain *Shaw, Savill, & Albion Co.*, from proceeding with their application before the Railway Commissioners, and for a rule for prohibition against the Railway Commissioners.

A rule *nisi* for prohibition and an interim injunction having

(1) 38 Ch. D. 576.

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been granted until this day (6th of July) the case now came on upon motion by the Defendants, *Shaw, Savill, & Albion Co.*, to discharge the rule *nisi*, and by the Plaintiffs, the dock company, to restrain the Defendants from proceeding with their application to the Railway Commissioners.

Romer, Q.C., and *F. Thompson* (*Jeune*, Q.C., and *Nicoll*, with them) for the Defendants, *Shaw, Savill, & Albion Co.*:—

It has been decided that the dock company is a railway company within the *Railway Companies Act*, 1867. If so, then we submit that it is a railway company within the meaning of the *Railway and Canal Traffic Act*, 1854, and *Regulation of Railways Act*, 1873, for all purposes, so that the provisions of the Acts apply to the whole undertaking and not merely to the railway portion; and the Railway Commissioners have jurisdiction to deal with the complaint of the Defendants that they have been subjected to undue and unreasonable prejudice and disadvantage in the dock dues levied by the company in violation of sect. 2 of the Act of 1854.

By the *Regulation of Railways Act*, 1873 (36 & 37 Vict. c. 48), s. 6, the jurisdiction of the Superior Courts, under the *Railway and Canal Traffic Act*, 1854 (17 & 18 Vict. c. 31), s. 3, to deal with complaints in respect of "anything done or of any omission made in violation or contravention" of sect. 2 of the Act of 1854, or of sect. 16 of the *Regulation of Railways Act*, 1868, or of any amending enactment, has been transferred to the Railway Commissioners, to whom the application was properly made. Then we say that the course taken by the dock company in requiring us to pay disproportionate dues is in direct contravention of sect. 2 of the *Railway and Canal Act*, 1854, being "an undue or unreasonable preference or advantage" to other shipowners over the Applicants, which subjects us (the Applicants) to that "undue or unreasonable prejudice or disadvantage" which it was the object of the section to prevent. The words of the section prohibiting preference "in favour of any particular person or company, or any particular description of traffic in any respect whatsoever," are very broad and general, and have not been restricted in construction to mere questions of undue advantage concerning the railway

itself: *Thompson* v. *London and North Western Railway Company* (1); *In re Marriott* (2). It cannot be contended that it is so unreasonable that the full meaning should be given to the words of the section, that they must of necessity be curtailed.

R. S. Wright, for the Railway Commissioners:—

Admitting that the dock company is a railway company and within the provisions of the Acts, the Commissioners think that the application is premature; and without further information on the question whether the acts complained of have any relation to the position of the company as a railway company, they are not prepared to state whether they have jurisdiction or not.

Latham, Q.C., and *Godefroi*, for the Dock Company:—

The Act of 1854 does not apply, and the Railway Commissioners have no jurisdiction to deal with the application of the Defendants. Having regard to the preamble of the Act of 1854 (17 & 18 Vict. c. 31); to the interpretation clause, sect. 1, that the word "traffic" shall include goods, animals, and other things conveyed by any railway company; to the governing words of sect. 2, that the company "shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from their railways" and to the concluding words of the section which sum up its object—"so that no obstruction may be offered to the public desirous of using such railways or canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf"—we submit that the provisions of sect. 2 must be limited to undue preference in matters incidental to the conveyance of traffic over a line of railway, and to the facilities for receiving, forwarding, and delivering such traffic. Admitting that we are a railway company, the complaint of the Defendants that there is an inequality in the dues charged at our *Tilbury Docks* twenty-five miles distant from, and unconnected with our line of railway, has nothing whatever to do with our *status* as a railway company,

(1) 2 Nev. & Mac. 115. (2) 1 C. B. (N.S.) 499.

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and cannot be brought within the provisions of sect. 2. If the contention of the Defendants be correct then all the words used as to receiving and forwarding traffic are unnecessary, and the object of the section would be quite sufficiently expressed by the words "no such company shall make or give any undue or unreasonable preference, &c." And if it had been intended that sect. 2 should extend to all matters done by the company within the meaning of the Act, one might expect that sect. 7, relating to damages for loss, would have been extended to any liability for loss however arising. Our contention is also strengthened by the subsequent enactments for securing equality of rates for passengers using steamboats authorized to be worked in connection with a railway (*Railway Clauses Act*, 1863, s. 30; *Regulation of Railways Act*, 1868, s. 16) which would have been wholly unnecessary if sect. 2 is to be construed in the extended sense claimed for it by the Defendants. On the authorities that construction cannot be maintained. In *West* v. *London and North Western Railway Company* (1), which was a complaint of "undue preference" as to facilities for storing coals at stations of the defendant company, the Judges were equally divided on the question whether storage of coal was a matter directly connected with the traffic; the whole tenor of all the judgments being that to bring a case within sect. 2 the complaint must relate directly to inequality in respect of traffic on the railway, must have something to do with conveyance and transport or with facilities relating to conveyance and transport.

In *South-Eastern Railway Company* v. *Railway Commissioners* (2) where prohibition was issued, the Act was construed by the majority in the limited sense for which we contend, by holding that the "facilities, &c." mentioned in sect. 2 related to the working of the traffic, undue preference, and to the want of co-operation between different companies with respect to continuous communication, and did not include structural accommodation. They also referred to *Bennett* v. *Manchester, Sheffield and Lincolnshire Railway Company* (3).

[CHITTY, J., referred to *Willes*, J. (4): "You must make

(1) Law Rep. 5 C. P. 622.
(2) 5 Q. B. D. 217.
(3) 6 C. B. (N.S.) 707.
(4) Ibid. 715.

out that this is traffic upon some railway, canal, or navigation: " *Baxendale* v. *London and South Western Railway Company* (1).]

Romer, in reply, referred to *Browne and Theobald's* Railways (2); *In re Oxlade* (3).

CHITTY, J.:—

The company known as the *East and West India Dock Company* has been decided to be a railway company within the meaning of the *Railway Companies Act*, 1867. The company is the proprietor of certain docks and a railway used in connection with one of the docks, and that railway is used also in connection with the general system of railways in the kingdom. The docks consist of the *East and West India Docks*, where the railway is found, and of the *Tilbury Docks*, which are distant from twenty to twenty-five miles. There is no connection between the *Tilbury Docks* and the railway. In a sense it is a distinct undertaking, but it is a part of the undertaking of the same company.

Application has been made to the Railway Commissioners, under the Acts of 1854 and 1873, the ground of complaint being that the company are affording undue preference to other persons in regard to dock dues in connection with *Tilbury Dock*, and that the Applicants are thereby injured within the statutes to which I have referred.

The Railway Commissioners, having considered the form of the application, are not at present satisfied that they have jurisdiction in the matter. It would have been possible, I take it, that some further explanation might have been made; that this application or statement, which has been delivered to them, might have been amended or enlarged; and consequently they express their opinion simply with reference to the state of things as it was presented to them.

The Applicants by their counsel have stated to-day that their written application to the Railway Commissioners embodies the whole of their claim. There is no question therefore of amending or altering. Now, the argument turns principally upon sect. 2 of the Act of 1854. The 1st section of that Act, which contains

(1) Law Rep. 1 Ex. 137. (2) 1st Ed. p. 394.
(3) 1 C. B. (N.S.) 454.

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definitions, enacts: "The expression 'railway company' shall include any person being the owner or lessee of or any contractor working any railway or canal or navigation constructed or carried on under the powers of any Act of Parliament." It is admitted that the term "person" there used is sufficient to include a corporation, and that therefore, so far as that definition is concerned, this company is a railway company within the meaning of the defining section.

Then comes sect. 2, which has been the subject of much anxious consideration in the cases which have been before the Court. And the question is, whether the following general words, towards the middle of that section, are to be expanded and taken according to their widest import, or whether they ought not to be cut down, having regard to the context of the section itself, and to the general scope of the Act as appears from an examination of its provisions. The enactment (leaving out immaterial words) is as follows: "Every railway company shall according to its powers afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from its railway." Canal companies are included, and canals are also mentioned, but that is the substance of the first part, or of the first sentence rather, of the section. Then come some negative words on which, according to the argument on behalf of Messrs. *Shaw, Savill, & Albion Co.*, the question turns, and are the words which, they say, ought to be expanded and taken in the largest possible sense: "And no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." As was pointed out, traffic is not referred to except in those words "particular description of traffic;" and it is said that there is no limitation to be found in that sweeping negative clause, which would justify the Court in importing into the clause some such expressions as "receiving, forwarding, and delivering traffic"—in other words, that this part of the clause is general, that it is of a universal nature, and is not to be limited by reference to the traffic on the railway. Then

the clause goes on: "and every railway company having or working railways which form part of a continuous line of railway, or which have the terminus or station near the terminus or station of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways by the other, without any unreasonable delay, and without any such preference or advantage, prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways of the several companies, be at all times afforded to the public in that behalf." Now in the exposition of this section the learned Judges apparently have differed somewhat in regard to what I may term the grammatical construction of it, that is to say, whether it ought to be considered as being divided into three parts or two parts. I do not think it is necessfor me to say anything upon that or to exercise my mind upon it; but I have come to the conclusion that these negative words are not to be taken in their widest import and in their widest sense, for the context and the scope of the Act of Parliament shew that the preference or advantage which has been referred to relates to traffic.

The title of the Act, which may be referred to for the purpose of ascertaining generally the scope of the Act, is "An Act for the better regulation of the traffic on railways and canals;" and the preamble: "Whereas it is expedient to make better provision for regulating the traffic on railways and canals"—may be referred to for the same purpose. Now, if the Applicants are right I do not see why a contractor, who was working a railway mentioned in sect. 2, should not be held to be within the scope of the enactment, not only so far as he is working the railway, but also as to any other business carried on by him, because he happens to be one of the persons to whom the language of sect. 2 applies. And if Mr. *Romer's* argument be correct, such contractor, in regard to the whole of his business, would be liable to the jurisdiction of the Railway Commissioners. Therefore, if I was construing this Act of Parliament for the first time, my conclusion would be adverse to the Defendants. I think that the argument founded on the Act on behalf of the Plaintiffs (the dock company) does

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receive some confirmation from the two subsequent Acts that were mentioned, viz., the *Railways Clauses Act*, 1863, s. 30, which relates to a railway company working steamers, and in substance provides, that there shall be no undue preference in the working of the steamers in favour of persons using the railway connected with such steamers. I have not examined the language of that section very carefully, and it may be that in some respects it goes beyond the enactment of 1854; but it would be quite unnecessary for the Legislature to legislate in regard to steam vessels, which is traffic belonging to a railway company, if this wide interpretation which is sought to be put on sect. 2 of the Act of 1854 were the right one. It would be unnecessary at any rate except as far as any additional provisions are made. I make the same observation with reference to the *Regulation of Railways Act*, 1868, merely using both these enactments for the general purpose of confirming the construction which I have put upon the Act of 1854 itself.

I do not propose to go through the authorities, but I think that the argument in reference to the decision in *West* v. *London and North Western Railway Company* (1) was well founded. In that case the Judges were divided, two and two. But when the judgments are examined, it will be found that the point of difference really was this—was the affording of the facility for the storage of coal connected with the traffic or not? And it did not occur to those learned Judges, who decided that the case did fall within the scope of the Act, to put the wide construction on the section that has been contended for. So that, having regard to the ground of the judgments, it appears to me that the four Judges, though they differed with regard to that particular point, would have adopted one and the same construction with reference to the question that has been argued before me; because if this point had been taken there would have been an end of the case at once. What did it matter whether it was the storage of coal in a place near the station or fifty miles off on some superfluous land which the company might somewhere or other have got, and which they were letting for the purpose of storage. The principle is one and the same.

I think it unnecessary to mention, as I have said, the other

(1) Law Rep. 5 C. P. 622.

authorities. There are many expressions to be found which will justify the conclusion that I have come to. In *Baxendale* v. *London and South Western Railway Company* (1) the Court drew what appears to me an obvious distinction between the railway company and its traffic as a railway company, and the railway company as a common carrier and its business as such. It was there held that the carriage beyond a second terminus was not auxiliary to the company's business as a railway carrier, but was something done by them in their business as common carriers generally; and that the plaintiffs were not entitled, and so forth. It is the principle only to which I am referring in that case.

Now, what has been done in this case has nothing to do with the railway traffic; it has been done by the *East and West India Docks Company* in respect of an undertaking which, I agree, for some purposes must be considered a part of their undertaking, but is like a distinct business carried on at a considerable distance, that is, twenty-five miles off the place where their railway is.

For these reasons I think that the Plaintiffs are in substance right.

Latham, Q.C., on the form of order referred to *Great Western Railway Company* v. *Waterford and Limerick Railway Company* (2), where the rule was made absolute for prohibition with costs against the defendant company; the appeal against the refusal by the Master of the Rolls of an injunction being dismissed with costs.

R. S. Wright:—The usual form at Common Law is a prohibition to the party with notice.

CHITTY, J.:—That would be much more convenient. There will be no order against the Commissioners, who are dismissed from the action.

Solicitors: *Renshaws; Freshfields & Williams; Solicitor for Board of Trade.*

(1) Law Rep. 1 Ex. 137. (2) 17 Ch. D. 493, 511.

F. G. A. W.

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In re MUFFETT. JONES *v.* MASON.

[1884 M. 2656.]

Administration—Annuity charged on Real Estate—Tenant for Life and Remaindermen—Corpus.

Freeholds were granted to trustees to the use that the grantor and his wife should during their joint lives and the life of the survivor receive thereout an annuity or yearly rent-charge, and subject thereto to the use of *M.* in fee. *M.* entered into a covenant with the grantor and his wife for payment of the annuity :—

Held, that, as between the tenants for life and remaindermen under the will of *M.*, the annuity must be capitalized, and the burden borne in proportion to the value of their respective interests.

Bulwer v. *Astley* (1), *Yonge* v. *Furse* (2), and *Yates* v. *Yates* (3) discussed and followed.

By an indenture, dated the 26th of February, 1876, and made between *G. B. Baxter*, of the first part, trustees of the second part, and *C. Muffett* of the third part, after reciting that it had been agreed that in consideration of *Muffett* granting to *Baxter* and his wife the annuities thereinafter mentioned, and entering into the several covenants thereinafter contained, the land and premises thereinafter described should be conveyed to trustees to the uses thereinafter declared for securing the payment of the said annuities, and subject thereto to the use of *Muffett* in fee, the said land and premises were conveyed to trustees to the use that *Baxter* and his assigns should during his life receive thereout the yearly rent-charge of £180, and after his decease to the use that his wife should thenceforth during her life receive out of the same premises the yearly rent-charge of £180, with the usual powers of distress and entry, and after the decease of the survivors of *Baxter* and his wife, and in the meantime, subject to the payment of the rent-charge to the use of *Muffett*, his heirs and assigns for ever. And in the same indenture was contained a covenant by *Muffett*, for himself, his heirs, executors, ad-

(1) 1 Ph. 422. (2) 20 Beav. 380.
(3) 28 Beav. 637.

ministrators, and assigns, with *Baxter* and his wife, and the survivors of them, his or her assigns, for payment of the said annual sum or rent-charge.

Muffett died in 1883, having by his will, dated in December, 1882, devised and bequeathed all his residuary real and personal estate, including the land and premises comprised in the above conveyance, to trustees, in trust for certain persons for life, with remainders over.

This action had been commenced for the administration of *Muffett's* estate, and on the further consideration of the action, both the annuitants being still alive, and the premises producing a rental of £150 a year only, the question arose whether as between the tenants for life and the remaindermen under *Muffett's* will the annuity or rent-charge of £180 ought to be capitalized, or whether it should be paid out of income.

Romer, Q.C., *Paget*, and *Pochin*, for the tenants for life :—

The annuity is a charge on the land, which must bear the burden of it, and the rights of the tenants for life and the remaindermen must be properly adjusted: *Bulwer* v. *Astley* (1). The annuity is a debt: *Yonge* v. *Furse* (2); *Yates* v. *Yates* (3).

Maclean, Q.C., and *Oswald*, for the infant remaindermen :—

In *Yonge* v. *Furse* there was a recital in the deed that the annuity was to be secured by a covenant and charge, and there was not only a covenant to pay, but also a charge on another estate belonging to the covenantor. Here the covenant is not the primary charge, and the recital in the deed shews that the land is to be the primary security.

In *Yates* v. *Yates* there was simply a covenant to pay.

Patching v. *Barnett* (4) is in favour of our contention.

We submit that at all events the rent of the premises should go towards discharging the annuity.

A. J. Matthews, for other infant remaindermen.

Farwell, for the trustees of the will.

(1) 1 Ph. 422.
(2) 20 Beav. 380.
(3) 28 Beav. 637.
(4) 51 L. J. (Ch.) 74.

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Looking at the substance, and not at the form of the transaction upon which the present question arises, the facts appear to me to be that the testator bought the hereditaments granted, and that the annuity for lives was the consideration. In other words, the annuity is the purchase-money. The deed contains a personal covenant on the part of the testator to pay the annuity, and his whole estate is assets for payment of the debt incurred under this covenant.

I do not think that this case is exactly governed by the authorities cited. It, however, falls within the principle of those authorities. In *Bulwer* v. *Astley* (1) the annuities were granted in consideration of a loan of money. That is shewn by the redemption clause. The object of the transaction there was to avoid the laws against usury. The Lord Chancellor, in overruling the Court below, looked at the effect of the transaction, and held that when the case was thus looked at and inquired into there was no doubt a debt, and therefore that payment of the annuity was to be borne by both the tenant for life and the person in remainder.

That case does not quite cover the present question, because it is clear that the annuities were redeemable. In *Yates* v. *Yates* (2) the testator entered into a personal obligation to pay the annuity, and the question was how far the burden of the annuity should be apportioned between the tenant for life and remaindermen.

Romilly, M.R., held that there was a mere debt, and that its payment should be cast upon the capital, but so that the burden should be proportionately adjusted between the tenant for life and remaindermen. The exact proportion is not material. The case shews that the personal liability to pay the annuity is equivalent to liability to pay an ordinary debt. We then come to *Yonge* v. *Furse* (3). There is no substantial difference between that case and the case before myself. It is certainly true that we do not find in the present instrument a recital, as in *Yonge* v. *Furse* indicating that the annuity was to be secured by the covenant of the testator, but the way to look at the transaction is to

(1) 1 Ph. 422. (2) 28 Beav. 637.

(3) 20 Beav. 380.

look at its substance, as was done in *Bulwer* v. *Astley* (1). Acting in that way, what do I find here? I find a personal obligation on the part of the testator to pay an annuity. This liability is in effect a debt. The testator's position is that of a man who had the fee simple in lands, subject to an incumbrance in the shape of an annuity for a life or lives. That was the way *Romilly*, M.R., looked at it in *Yonge* v. *Furse* (2). He says (3): "Here a debt was contracted by the purchaser to the vendor; for the purpose of securing it, he gave a charge on the estate and a personal covenant to pay it, which bound his personal estate. It can make no difference whether the purchase-money was to be paid in a gross sum, or from time to time, by way of an annuity for life; it is equally a debt."

That is the same as the case before me. It was for the purpose of securing a debt that the testator assented to a charge on the land and gave his personal covenant, nor does it, to my mind, make any difference whether the consideration or purchase-money for the grant was to be paid as a gross sum, or to be paid from time to time. The effect of that decision in *Yonge* v. *Furse* is, that the substance of the transaction must be looked at. When that is looked at it appears that a debt and not a rent-charge only has been created. The only question which might remain would be whether the liability to pay the annuity falls upon the real or the personal estate. In the particular case of *Yonge* v. *Furse* the personal estate was made to primarily bear the burden. That case was before *Locke King's Act*. However, that Act does not affect the present question. It only determines the incidence of a debt as between real estate charged with it and the testator's personal estate, but it does not in any way regulate the burden as between persons who take in succession. However, here the same persons take both the real and personal estate. I hold that the principle of the three cases referred to applies to the present case, and that the £180 annuity is to be treated as if capitalized and paid out of the *corpus* of the estate, and that any payments made since the date of the testator's death, and any future payments of the annuity must upon the footing of this decision be adjusted

(1) 1 Ph. 422.
(2) 20 Beav. 380.
(3) 20 Beav. 383.

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between the tenants for life and remaindermen. The testator's will does not contain anything which shews that the legal principle was not intended to be applicable.

Solicitors: *A. P. Jackson; G. J. Vanderpump & Son*, agents for *H. M. Burt, Hastings.*

G. M.

CHITTY, J. 1888 *Aug.* 3.

TAYLOR *v.* NEATE.

[1888 T. 1258.]

Partnership—Dissolution—Receiver and Manager—Sale.

Where articles of partnership expressly provide for a division of assets on dissolution the Court has, nevertheless, jurisdiction to direct a sale as a going concern, and will do so when that is the most beneficial mode of realization.

After dissolution of a partnership by notice pursuant to the articles the Court will, until a sale of the business as a going concern, appoint a receiver and manager for the purpose, in the meantime, of preserving the assets by carrying into effect existing contracts and entering into such new contracts as are necessary for carrying on the business in the ordinary way, but so as not to impose, by speculative dealing or otherwise, onerous liabilities on the partners.

MOTION for a receiver and manager of a dissolved partnership until sale or further order.

The Plaintiff had for eleven years carried on the business of a mechanical engineer, contractor, and ironfounder at the *Medway Works, Rochester*, and for the last five years in partnership with the Defendant, *P. J. Neate*, under the terms of a partnership deed of the 11th of May, 1883. It was thereby agreed that the partnership should be carried on under the firm of *Taylor & Neate* from the 21st of May, 1883, until the 29th of September, 1902, if both the partners should so long live, with a proviso for determining the partnership on the 30th of June, 1888, or the 30th of June, 1894, if either partner should desire to do so, and should give not less than twelve months' or more than eighteen months' written notice of his desire.

It was also provided that within six calendar months after the expiration or determination of the partnership, otherwise than

by the death or bankruptcy of either partner, a full and general account in writing should be taken by the partners of all the moneys, stock-in-trade, debts and effects then belonging to or due to the partnership, and all moneys and debts due by, and of all liabilities of the partnership (including advances made under article 9), and a just valuation should be made of all the particulars included in such account which required and were capable of valuation, and immediately after such last-mentioned account should have been so taken and settled the partners should forthwith make due provision for the payment of all moneys and debts then due by the partnership, and for meeting all the liabilities thereof, and subject thereto all the moneys, stock-in-trade, debts and effects then belonging or due to the partnership should be divided between the partners in equal shares—with provisions for the execution of the usual instruments by the partners respectively for facilitating the getting in of the outstanding debts and effects of the partnership, and for indemnifying each other, and for vesting the sole right and property in the respective shares in the said moneys, stock-in-trade, property and effects in the partner to whom the same respectively should upon such division belong, and for releasing to each other all claims on account of the partnership.

"(29.) If either partner shall die or become bankrupt during the partnership the other partner shall, before the expiration of one calendar month from such death or bankruptcy, declare his option either to purchase the share and interest of the deceased or bankrupt partner in the partnership moneys, &c., upon the terms thereinafter mentioned, or to allow the said moneys, &c., to be divided between himself and the executors or administrators or trustee or other representative of the estate of the deceased or bankrupt partner as directed by the preceding article; and in case such partner shall declare his option to allow the said moneys, &c., to be so divided as aforesaid, then the same shall be so divided accordingly, and upon such division such deeds and things shall be executed and done by the surviving partner and the executors and administrators or trustee or other representative of the deceased partner or bankrupt partner respectively as directed by the preceding article on a division made

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between the partners on the determination of the partnership otherwise than by death or bankruptcy."

On the 30th of June, 1888, the partnership was determined pursuant to written notice given by the Defendant on the 29th of June, 1887.

On the 13th of July, 1888, this action was commenced for an account of the partnership dealings between the Plaintiff and Defendant under the agreement of May, 1883; to have the affairs of the partnership wound up; and for a receiver and manager.

Plaintiff now moved for the appointment of a receiver and manager of the partnership business to collect and get in the outstanding debts and assets, and out of the first moneys to be received to pay the debts due from the partnership, and to manage the business until the sale thereof or further order.

The Defendant objected to the sale of the business as a going concern as being contrary to the meaning and intent of the partnership articles; denied that the goodwill was of any value except from the confidence reposed by customers of the firm in the Defendant, and asserted that the appointment of a receiver and manager was wholly unnecessary, and that in any case the duties of such receiver and manager, if appointed, should be confined to completing pending contracts and must not involve the creation of any new liabilities.

On the other hand the Plaintiff insisted that it was impossible to make a division *in specie* of the plant and stock, and that the whole of the works must be sold as a going concern, in which case the goodwill, being very valuable, would produce a large sum. As the contracts which had been undertaken by the firm would take some weeks to complete, the appointment of a receiver and manager was absolutely necessary; and, with a view to the preservation of the business and its sale as a going concern, the receiver and manager must have power, subject to the direction of the Judge in Chambers, to enter into fresh contracts.

Romer, Q.C., and *Begg*, for the Plaintiff, moved for an order for the appointment of a receiver and manager of the business, with a direction for the sale of the partnership property and effects and the goodwill as a going concern, according to the form

in *Seton* (1). It being practically impossible to divide the assets *in specie*, as provided by the articles, a sale of the business and goodwill will be directed: *Cook* v. *Collingridge* (2); and in order to preserve the property as a going concern until a sale can be effected a receiver and manager must be appointed.

Maclean, Q.C., and *Daniel Jones*, for the Defendant:—

After the determination of the partnership by notice pursuant to the articles the Court has no jurisdiction to appoint a manager to carry on the business until the sale, except by mutual consent or by a special provision contained in the articles. If a receiver and manager be appointed his authority must be limited strictly to completing contracts which are pending but incomplete at the time of the dissolution: *Pollock* on Partnership (3). He cannot, however, be allowed to enter into any new contracts so as to enlarge the responsibility of the partners beyond the limited time for which it is engaged, and involve them in further liabilities after the determination of the original partnership contract.

[*Turner* v. *Major* (4), and *Lindley* on Partnership (5), were also cited.]

Romer, in reply, offered to consent that the receiver and manager should not enter into any new contract involving liability exceeding £200.

CHITTY, J:—

During the argument of this case the parties through their counsel have very wisely agreed to take a dissolution judgment, which involves the usual accounts. It is clear there must be a a sale of the partnership assets. The mode of sale in these cases adopted by the Court is that which is most beneficial to the parties. Unfortunately where partnerships are determined the partners may not be able to wind up their affairs amicably. They may, and here they do disagree. The matter is necessarily placed in the hands of a Court of Justice, and the Court of Justice does the best for all concerned in a partnership, whether

(1) 4th Ed. p. 414, Form 13.
(2) Jac. 607.
(3) 3rd Ed. p. 95.
(4) 3 Giff. 442.
(5) 5th Ed. p. 555.

CHITTY, J. between two or between a great many. The sale therefore which is directed is always directed in the manner which the Court thinks most beneficial.

1888

TAYLOR v. NEATE.

The partnership in this case was that of a mechanical engineer, ironfounder, boiler maker, and contractor, carried on at the *Medway Works*. The usual course of the Court in regard to cases of this kind and a business of this class is to direct a sale of the property as a going concern. In the case before me there is a contest whether there is a goodwill or not. It is plain there is some goodwill. What the value of it may be I do not pretend to know. The parties are not agreed upon it in their affidavits. The Plaintiff considers it evidently of much higher value than the Defendant; but that there is some goodwill attached to the business I consider to be shewn not merely from the nature of the business, but also on the evidence which has been adduced. The goodwill therefore must be preserved, and that goodwill must be sold. The mode in which the goodwill of a partnership is sold at the present day is so as, within the well-known limits, to allow either party, where he has not bound himself by any contract in the deed or otherwise, to continue to carry on a similar business. Of course the knowledge of that fact is very important to the purchaser, and does in many cases detract very much from what otherwise would be the value of the goodwill. In this case the parties have agreed that there should be a sale, and I shall direct that the sale shall be in accordance with the ordinary course of the Court, viz., that the assets shall be sold as a going concern, or otherwise. I put in the words "or otherwise" so as to give the Defendant an opportunity of urging anything which may be special to the case before the Judge in Chambers. Businesses vary so very much that it is impossible to lay down a hard and fast rule as to what is best to be done with a going concern, or with the book debts or stock-in-trade or the implements. It is well known as a general proposition that to break up the stock and to sell it, and to break up the tools, machinery, and plant and to sell them, is to sell at a disadvantage. I state that as a general rule. As far as I know there is nothing special in regard to this business, and the Court does not allow one of the partners, in order that he himself may gain some special

benefit, to insist upon a mode of sale which is not the best for the common interest. I think I have said enough now to shew the nature of the order I make with regard to the sale.

Then in this state of things which has arisen between the partners there must be a receiver, and I am satisfied also that there must be a manager. The grounds for the appointment of a manager may be stated in two or three words. There are existing contracts which have to be carried into effect. The partners, by their contracts *inter se* and with third parties, have brought themselves under a liability to perform certain obligations. There are two kinds of contracts here—the contract between themselves and contracts with third parties, which must be performed. The Court would not allow one partner to say to the other partner, "Well, I dislike you" (the other partner) "so much that I will not have this contract performed." And when the parties will not agree, after they have dissolved, as to the mode of executing works which they have to execute according to an existing contract, it is quite clear that the Court must intervene, and that it will not allow one partner to insist upon something being done in a particular way. The result is that the Court must take into its own hands, by the appointment of a proper officer, the management of such a concern as this is, and that manager must of necessity enter into subordinate contracts. For instance, in the case before me, he must employ workmen and pay the wages, and it is said that some weeks will elapse before these contracts can be worked out.

The argument for the Defendant was put very high; it was that the Court has no jurisdiction to appoint a manager with power to enter into any new contracts for the purpose of carrying on the business. That proposition is a great deal too high, because, as I have already said, the manager must enter into some contracts for the purpose of performing what, for the sake of distinction, I may call the principal contract. He must employ workmen and pay wages, and if they happen to be leaving the business, as they may be after the dissolution, he may have to get other workmen. I was rather surprised to hear it said that where there is a business with two partners, which bids fair to be sold as a going concern, the Court cannot by

CHITTY, J. 1888 TAYLOR v. NEATE.

means of appointing a manager see to the carrying on of the business, because, it is said, the manager cannot enter into any new contracts. If that proposition is analysed with a little care, it is seen at once that it reduces the Court to this singular and absurd position, that it appoints a manager who cannot manage. The power of the manager is very well explained by *Jessel*, M.R. (*Sargant* v. *Read* (1)). The manager must carry on the business, and carrying on the business involves entering into contracts. What the nature of the contracts is is another thing, but still they are, according to law, contracts. Suppose that a business, which is very prosperous, has to be sold as a going concern, there is a large amount of stock which in the ordinary course is worked up for the purpose of sale. It was suggested, and indeed argued, that a manager could not employ persons to work that stock up, but must leave it as it stood at the moment of dissolution; in other words, he must starve the business; must not carry it on, but stop it. In some businesses there are sales across the counter, and many things must be done in the business which involve new contracts of some nature. Put the case of a job-master, a business which involves keeping a large number of horses; some may be out on contract in the usual way; some are kept in the stable for letting to regular or chance customers. To say that there can be no dealing with those horses would be an absurd proposition, because the manager would have to keep them in the stables; he must feed them; and in order to feed them he must buy corn. In my judgment a business of that sort must be carried on in the ordinary way. A manager does not speculate with the business, but he carries it on according to the general course of business adopted in the particular trade. I should say a manager in a case of that kind could let out the horses on reasonable contracts; but whether it is for six months or a year, or merely the letting of a horse for the purpose of a ride, I need not say. A great many other instances might be given. In my experience as a Judge in cases of this kind for a good many years I have seen a great variety of instances which would afford illustrations, if necessary, to shew that the extreme proposition put before me cannot be maintained.

(1) 1 Ch. D. 600.

I shall appoint a manager, and I shall be quite willing to put in some limit with regard to the magnitude of any operation which he undertakes, because here I agree entirely that when the Court appoints a manager the Court does it for the purpose of preserving the assets, and nothing more, and does not intend to throw any liabilities of an onerous kind upon the partners. An attempt to do anything of that kind would be quite unreasonable, and not really for the sole purpose for which, to my mind, it is justified in acting—that is, in order to bring about a proper sale of that in which the parties are interested in common.

There are many cases where the manager could not and ought not to be allowed to enter into speculative transactions, but the difficulty in every case is to say what is the reasonable limit, and what is not.

I will make the common order, and leave the manager to do his duty. If there is any question of difficulty or doubt, the party who has the conduct of the action, the Plaintiff in the present instance, had better make an application with a view to the protection of the manager.

After some discussion it was agreed between the parties that the manager to be appointed should not enter into new contracts involving a liability of more than £200 without consent of the partners, or sanction of the Judge.

MINUTES OF ORDER:—Usual partnership accounts. Appoint Plaintiff *interim* receiver and manager without salary or security; he undertaking not to discharge the works manager without the consent of the Defendant or direction of the Judge. Appoint a receiver and manager, on usual reference to Chambers, to carry on the business with a view to a sale; such manager not to enter into any fresh contracts involving liability of more than £200 without the consent of the partners or direction of the Judge. Order sale of business, &c., forthwith, as a going concern, or otherwise, as the Judge may direct.

Solicitors: *Wellington Taylor; Stileman, Neate & Toynbee.*

F. G. A. W.

NORTH, J.
1888
April 10, 11.

In re HOMER DISTRICT CONSOLIDATED GOLD MINES.
Ex parte SMITH.

[1887 H. 319.]

Company—Directors—Meeting—Notice—Informality.

Application was invited by a company for 106,000 preference shares. At a meeting of all the directors, five in number, it was resolved not to allot till 14,000 shares were applied for; at a meeting of two (a quorum of) directors held shortly afterwards it was resolved that the previous resolution was cancelled, and that the shares then applied for, about 3000, should be allotted. The meeting was held at two o'clock, on a few hours' notice to two of the directors who did not attend, of whom one did not receive his notice till the next day, and the other gave notice he could not attend till three; the fifth director was abroad and no notice was sent to him:—

Held, that the allotments made under the later resolution were void against the allottees.

THIS was a summons under sect. 35 of the *Companies Act*, 1862, on behalf of *John George Smith*, *Thomas Waller*, and *P. Charles Beyer*, to whom 100, 20, and 10 preference £1 shares in the *Homer District Consolidated Gold Mines, Limited*, had been respectively allotted, to have their names removed from the register of shareholders on the ground of misrepresentation in the prospectus on the faith of which they applied for the shares, and also on the ground of irregularity in the allotment, and for damages.

It is unnecessary to state the nature of the alleged misrepresentations. In the year 1886 the company, which was a going concern formed in 1884, invited subscriptions for 106,000 preference £1 shares. Messrs. *Smith*, *Waller*, and *Beyer* applied for 100, 20, and 10 of such shares respectively, on which they paid a deposit of 5*s.* a share. On the 1st of December, 1886, two of the directors resolved to allot the shares, and letters of allotment were sent to and received by the Applicants on the same day. This summons was taken out on the 27th of January, 1887.

At the time of the transactions referred to below, the directors of the company were five in number, Messrs. *H. Duncan*, *G. P. Simpson*, *G. P. Witt*, Dr. *A. B. O'Connor*, and Colonel *F. J. C. Halkett*, of whom two formed a quorum.

The company were under agreement with *Butterfield*, a vendor of mines to the company, giving him a charge on the money to be derived from the proposed issue of preference shares, and requiring the company to proceed with the allotment of shares within ten days of advertisement. A board meeting was held on the 5th of November, 1886, at 3, *Throgmorton Avenue*, the offices of the company, at which all five directors, Mr. *Butterfield* and the solicitor of the company also were present. Among other business transacted it was resolved: "That Mr. *Butterfield* be requested to waive the clause contained in the agreement between Mr. *Butterfield* and the company, dated the 12th day of October, 1886, with reference to requiring the board to allot whatever shares may be applied for within ten days after the first advertisement of the company, irrespective of the number of shares which may then have been applied for, and that the board shall not be required to proceed to allotment unless at least 12,000 preference shares shall then have been applied for by *bonâ fide* applicants."

The meeting was adjourned till the next day, the 6th of November, 1886, and one of the resolutions passed at the adjourned meeting appeared on the minutes in the following terms:—

"It was resolved, Mr. *Butterfield* assenting, that no allotment should be made unless applications for 14,000 £1 preference shares of the company should have been applied for by approved applicants."

On the morning of the 1st of December, 1886, Dr. *O'Connor* and Colonel *Halkett* were at the office of the company. There was before them a letter from the company's stockbroker to the effect that it was very important that the preference shares which had been applied for should be allotted at once. They sent letters to their two co-directors, *Simpson* and *Witt*, at their respective offices in *London*, giving notice that a board meeting would be held at the offices of the company on that day at two o'clock; but no mention was made in the letters of the purpose for which the meeting was called. The letters were sent out (as the Judge held) not earlier than eleven o'clock. Mr. *Duncan* had since the former meetings gone to *America*, and therefore no notice of the meeting was sent to him. Mr. *Simpson* received his notice, and

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sent back a verbal message that was duly received that he could not attend before three o'clock. About ten minutes past two o'clock he wrote a letter to the same effect, which was received by Dr. *O'Connor* and Colonel *Halkett*, who were sitting in meeting. Mr. *Witt* was not at his own office on the 1st of December, and did not receive the letter sent to give him notice of the intended meeting till the next day. The practice of the company as to giving notice of board meetings was deposed to by Mr. *Simpson* as follows: "As to notices of meetings, as a rule they came to my house the night before. I never received a shorter notice, except that for the meeting on the 1st of December, 1886. Meetings were never held without notice except in cases where they were adjourned to a fixed time."

At two o'clock on the 1st of December Colonel *Halkett* and Dr. *O'Connor* proceeded to hold a meeting at the offices of the company, of which the following are the minutes appearing in the books of the company:—

"Present.—Dr. *A. B. O'Connor* in the chair. Colonel *F. J. C. Halkett*. Mr. *Butterfield* was also present.

"It was resolved that the minutes of the meetings of the board held on the 5th, 6th, 8th, 9th, 10th, 11th, 12th, 16th, and 19th November, 1886, which were read, be, and the same are hereby ratified and approved, and the chairman of this meeting Dr. *A. B. O'Connor* be authorized to sign the same.

"Referring to the following resolution passed at the meeting of the directors held on the 5th of November, 1886, and of the resolution following next thereafter passed at the meeting of the directors held on the 6th of November, 1886.

"It was resolved, Mr. *Butterfield* having consented in writing to this being done, the said resolutions are hereby rescinded and declared to be of no effect.

"It was resolved that the secretary be hereby directed to execute two originals of the following agreement of indemnity in the presence of two directors and to hand one of the same to Mr. *Butterfield* after he has executed the two agreements, and to deliver to Mr. *Butterfield* a copy of this resolution.

"Applications for shares entered in the allotment book, numbered 1 to 59 inclusive, having been laid before the board, it was

resolved that the number of shares respectively entered in the column of the allotment book headed 'No. of Shares allotted' opposite the name and address of each applicant and the number of shares applied for, be and are hereby allotted to each applicant in pursuance of his application, and that in cases where there are no number of shares appearing in the column of shares allotted opposite the number applied for no allotment be made, and that the deposits paid on application be returned to the applicants, and it was further resolved that the secretary be and is hereby directed to post letters of allotment to said applicants and request them to pay the amount due on allotment on or before Tuesday, the 17th inst.

"It was resolved that the secretary be and is hereby directed to send a letter in the following words, enclosed with the allotment letter to each person to whom shares have been allotted."

"The meeting then adjourned to Thursday, the 2nd inst., at 12.30."

Unconditional applications for shares to the number of about 3000 had been made, which had not then been withdrawn. Those in respect of which the number of shares applied for did not appear in the allotment book and were not dealt with, comprised a small number of shares only. Letters of allotment were at once sent on to the applicants for the allotted shares and including the 130 shares the subject of this summons.

G. T. Millar, for the summons :—

The whole proceedings connected with the allotment were so grossly irregular that they are utterly void : *Browne* v. *La Trinidad* (1) ; *Bosanquet* v. *Shortridge* (2) ; *D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Company* (3).

C. E. E. Jenkins, for the company :—

The Applicants cannot take advantage of any irregularity, if there be any irregularity, in the proceedings up to allotment. The minutes are in due form, the resolutions were passed by a proper quorum of directors ; the company could not, had it been

(1) 37 Ch. D. 1. (2) 4 Ex. 699.
(3) Law Rep. 2 Ex. 158.

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their interest to do so, have repudiated the allotment; any offence was against the company, not against the Applicants, who, so far as these transactions are concerned, were strangers. The two directors had acted so as to bind the company, however improper their acts may have been, there were, therefore, all the elements of a contract binding on both sides.

NORTH, J.:—

The question is, whether the allotment is void in any way. In my opinion the three persons applying to the Court are entitled to say, as they did very shortly afterwards say, by taking out this summons, that they are not shareholders, and that what was done has not the effect of committing them to that position. It seems to me that what was done was as irregular as possible. Without wishing to suggest any fraud on the part of the two directors present, the conclusion I come to as to their acts is that they did think it desirable that the shares should be allotted as soon as possible. They knew that *Witt* and *Simpson* had opposed the allotment of shares till a larger number were applied for. They proposed to do what they may have thought they could do; they thought they could get rid of the opposition of their co-directors, and pass a resolution that would bind the company.

With regard to the notice of the meeting, it was such as had never before been given in the history of the company. The shortest notice that had ever been given before was a notice for the next day. The notice was sent out in a most irregular way. What is more, it was expressed in such a way (I cannot help thinking intentionally so expressed) as not to give *Witt* and *Simpson* notice of what was to be done. On that notice at two o'clock, the two directors present knowing that one of the other two summoned could not be present till three, and not knowing whether the other could come, proceeded at once to rescind a resolution passed by the board two weeks before. In my opinion that was about as irregular as anything could be. No doubt a bare quorum is capable to act and bind the company at a meeting duly convened, with proper notice given to the other directors, at which therefore all the other directors may, if they please, be present; but, these two directors met, having abstained from

telling the others what they intended to do, and proceeded to pass these resolutions in the full belief, and, I think, knowledge, that if the others had had notice and been able to be there they would have objected; and further than that, with notice as to one that he would be there at three, they proceeded to pass their resolution at two. They ought certainly to have waited. I do not say that would have been enough. I come to the conclusion that what was done on that occasion was not the act of the board of directors, and did not bind the company, and had not the effect of getting rid of the resolutions previously passed by the board. Under these circumstances I come to the conclusion that the Applicants were never properly put on the list of members, and were entitled to have their names removed. [His Lordship considered that on the question of misrepresentation the Applicants had succeeded in part and failed in part. He directed the company to pay three-quarters of the Applicants' costs and return the deposits.]

An appeal from this decision was dismissed, the Appellants having failed to give security for costs.

Solicitors for the Applicants: *Ashurst, Morris, Crisp & Co.*
Solicitors for Company: *Michael Abrahams, Son & Co.*

D. P.

NORTH, J.

1888

July 6.

In re CRAWSHAY.
DENNIS *v.* CRAWSHAY.

[1881 C. 1082.]

Practice—Order as to Supreme Court Fees, 1884, *Schedule* (*Item* 72).

The Court fees on a trustee's periodical accounts are taken on a percentage on the amounts found from time to time to have been received, not on the amounts found due.

Where an account is lodged and no further step is taken no Court fee is payable. Where an account is lodged and partly proceeded with but not certified, the Court fee is to be proportionate to the work done.

TWO actions—*In re Crawshay*, *Dennis* v. *Crawshay* (1881. C. 1082), a creditor's action, and a legatee's action, *In re Crawshay*, *Crawshay* v. *Crawshay* (1881. C. 1703)—were instituted to administer the estate of *Henry Crawshay* against his executors. One order was made for administration in both actions. The creditors, the Plaintiffs in the first action, were paid off, and the conduct given to the legatee, the Plaintiff in the second action.

Two partnership actions, *Wintle* v. *Crawshay* (1882. W. 2049), and *Wintle* v. *Crawshay* (1882. W. 2050), were brought by the direction of the Court in the administration by one executor against the other two executors, the testator's sons, and partners. The Defendants in these actions were appointed receivers and managers, and directed to account yearly. The managers had lodged five yearly accounts in chambers, distinguished for the purpose of this application as accounts A, B, C, D, and E. The first four sets of accounts had been passed and vouched. The accounts E had merely been lodged, they had not been proceeded with in consequence of negotiations the result of which might render it unnecessary to do so. The accounts A were lodged in 1883, but not passed till after the Order as to Supreme Court Fees, 1884, came into effect. The other accounts were lodged in the years 1884, 1885, 1886, and 1887, respectively.

A summons in the four actions was taken out in Chambers to provide for the payment of certain fees and charges, including the Court fees in respect of the accounts taken in the partnership

actions. The consideration of so much of the summons as related to the carrying over of the Court fees in respect of the partnership accounts was adjourned into Court to determine whether the fees were to be taken on a percentage of the gross amounts received by the managers or on a percentage of the accounts found due from them on each account. The part of the summons adjourned into Court was now disposed of. The official solicitor had been served.

Crackanthorpe, Q.C., and *H. Fellows*, for the Applicant:—

The general rule fixing the Court fee in respect of accounts of trustees and others taken in Chambers is that numbered 72 in the Order.

That rule provides that the fee is to be taken on the amount found to have been received; that amount, however, is limited or cut down by the portion of the rules explaining the items.

The explanatory part divides the class of cases included in Fee No. 72 into two sub-classes. The accounts of trustees who do not account periodically is placed in the first class, where the total amount on which the fees are chargeable is limited. That mode of cutting down the fees on periodical accounts was not thought appropriate. The accounts of trustees who account periodically were taken out of this class and put into the other; so that the fees are to be taken on the amounts from time to time found due instead of on the amounts found to have been received. We rely on the letter of the rules. However, this mode of assessing the fees is not contrary to the reasons given in *Armitage* v. *Elworthy* (1), for where the accounts are taken periodically some of the balances will be against the trustee, and there will be some Court fee payable, though the estate may be insolvent.

Ingle Joyce, for the official solicitor, was not called on.

NORTH, J.:—

I do not think there is any doubt as to what the meaning of the order is. The item in the schedule which provides for the amount to be paid, and defines the cases in which it is to be

(1) 13 Ch. D. 91.

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paid, including such a case as the present, is that numbered 72. That says that "On taking an account of moneys received by an executor, administrator, trustee, agent, solicitor, mortgagee, co-tenant, partner, receiver, guardian, consignee, bailee, manager, provisional official or other liquidator, sequestrator, or execution creditor, or other person liable to account, for every £100, or fraction of £100, of the amount found to have been received without deducting any payment." That is the general rule applying to all cases within item 72; the fees are payable on the amounts found to have been received, not on the balances. In other cases relating to accounts of debts, and provided for by items 73 and 75, the fees are payable on the amounts found due on the balances.

Then we come to the explanatory paragraphs after item 81, which are introduced by way of qualification of the preceding items from 69 to 81. The paragraph on which the question now arises begins with these words: "The amounts for or in respect of which the following fees are payable shall be limited to £200,000 in the following cases." The amount payable is not to be fixed in a different way from that already indicated; but it is, in certain cases, to be limited to a maximum amount; and in the cases under item 72, the one we have to deal with, it is on the amount of the receipts and not on the balance found due. Therefore it begins as a qualification imposed on fees payable on the amount of receipts, and then it goes on to state what the qualifications imposed are; the sub-paragraphs (*a*) (*b*) and (*c*) are not material, sub-paragraph (*d*) being the one which deals with cases within item 72. It divides them into two classes: the first class being accounts of executors, administrators and trustees other than a trustee directed to account periodically; the other class being all other cases within item 72, including accounts of trustees directed to account periodically. The case in which the amount is intended to be limited is the first of the two classes, which is in that respect favoured. Then it is said that in the other class, the words in the explanatory clause, "the amount found due," are to prevail and alter the mode provided for assessing the fees. If that were so this absurd result would follow—that the fees in the latter class would be less than those in the

former, and the result would be that the greater benefit would be conferred on the class obviously not intended to be the most favoured. It seems to me that, reading the item numbered 72 with the explanatory paragraph, the item is to prevail, and the words "found due" in the explanation clearly do not express what was intended. I am satisfied that the explanatory clause was not intended to alter the mode in which the charge is to be made, but merely to limit the amount on which the charge is to be levied in certain cases. It is as if the words "found to have been received" had been there instead of "found to be due;" and though no doubt I am putting a meaning on the words "found due," not the natural meaning, and am altering its meaning, I have to construe as best I can the phrase, which is inconsistent as it stands with the preceding language. I have to look at the whole, and if it is obvious what the meaning of the whole is, notwithstanding that the words "found due" are found in the explanatory part, I must give that obvious meaning to the rules.

Crackanthorpe:—As to the accounts carried in but not proceeded with, no trouble has been incurred in Chambers, there ought to be no fee payable in respect of such accounts.

Ingle Joyce:—Some time may have been given in the office, I cannot admit that no charge at all should be made.

NORTH, J.:—

Proportionate fees should be charged according to the work actually done. There should be no charge in respect of accounts merely lodged.

Solicitors: *Cookson, Wainewright, & Co.; The Official Solicitor.*

D. P.

NORTH, J.

1888

July 7.

In re ENGLISH'S SETTLEMENT.

Public Body—Settled Land taken under Statutory Powers—Payment of Purchase-money into Court—Petition for Transfer of Fund to Credit of Action to determine Beneficial Right—Trustee—Costs—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 80 [*Revised Ed. Statutes, vol. ix. p.* 646].

Land subject to the trusts of a settlement was taken by the Metropolitan Board of Works under their statutory powers, and the purchase-money was paid into Court. An action (to which the trustee of the settlement was a defendant) had been brought to determine who was beneficially entitled to the property, and the persons who were found to be entitled petitioned for the transfer of the fund to the credit of the action. The petition was served on the trustee, and she appeared by counsel on the hearing:—

Held, that the trustee was entitled to appear, and that the Board must pay her costs.

PETITION asking for the transfer of a sum of £7472 14*s.* 3*d.*, money on deposit in Court, and £49 16*s.* 3*d.* cash in Court, to the credit of an action—*Hillyerd* v. *Appleyard*. The sums in question were standing to the credit of "*Ex parte Metropolitan Board of Works, In re Metropolitan Street Improvements Act*, 1883, *Catherine Jane Selby Appleyard*, trustee of a declaration of trust in favour of *Robert* and *Ann English*, with power of sale."

The declaration of trust was made by a deed, dated the 17th of of February, 1836, between *R. L. Appleyard* of the one part, and *Robert English* and *Ann* his wife, of the other part, by which it was declared that *R. L. Appleyard* should stand possessed of certain copyhold hereditaments (which had been surrendered by *English* and his wife to his use in fee) in trust, during the joint lives of *English* and his wife, to pay the rents to her for her separate use, and, from and after the death of either of them, in trust for the survivor in fee, according to the custom of the manor. *R. L. Appleyard* was duly admitted tenant in November, 1836. *English* died in February, 1854, and his wife died in March, 1854, intestate and without issue. *R. L. Appleyard* died in December, 1843, having devised all estates vested in him as trustee to *Charles Appleyard* in fee, on the trusts affecting the same. *Charles Appleyard* was admitted tenant in April, 1854, and he died in

December, 1882, having devised all estates vested in him as trustee to *Catherine Jane Selby Appleyard* in fee, on the trusts affecting the same. She was admitted tenant of the copyhold hereditaments in September, 1883. The action *Hillyerd* v. *Appleyard* was, in June, 1884, commenced against her by one of the Petitioners, to determine who were the persons beneficially entitled to the copyhold hereditaments, and in this action it was found by the Chief Clerk's certificate that the present Petitioners were the persons beneficially entitled to the property. The Metropolitan Board of Works, under the powers conferred on them by the above Act, with which the *Lands Clauses Consolidation Act*, 1845, was incorporated, took the property and paid the purchase-money (determined by valuation under sect. 9 of the *Lands Clauses Consolidation Act*) into Court to the credit of the above-mentioned account. The property was afterwards conveyed to the Board by Miss *Appleyard*. The two sums in Court were the purchase-money and interest thereon.

The Petitioners prayed that, pursuant to sect. 80 of the *Lands Clauses Consolidation Act*, the Metropolitan Board might be ordered to pay the taxed costs, charges and expenses, of and incident to the application, of the Petitioners and of Miss *Appleyard*.

Crackanthorpe, Q.C., and *Welby King*, for the Petitioners.

Geare, for the Metropolitan Board of Works:—

The Board ought not to be ordered to pay the costs of the appearance of the trustee. As the petition only asks for the transfer of the fund from one credit to another, the trustee ought not to have appeared, or, at any rate, she should have been a co-Petitioner: *Sidney* v. *Wilmer* (1).

Napier Higgins, Q.C., and *Spence*, for the trustee:—

The fund represents the purchase-money of the trust estate, and the Court could not deal with it in the absence of the trustee. She is entitled to appear and to have her costs from the Board: *Re Burnell's Estate* (2); *Ex parte Metropolitan Railway Company* (3). The trustee has a lien on the fund for costs, charges

(1) 31 Beav. 338.
(2) 12 W. R. 568.
(3) 16 W. R. 996.

NORTH, J. 1888 *In re* ENGLISH'S SETTLEMENT.

and expenses. The above two cases are decisions of Lord *Romilly*, M.R., of later date than his decision in *Sidney* v. *Wilmer* (1).

Geare, in reply:—

In both the cases cited against me the petition asked for the payment of the fund out of Court; not, as here, for its transfer to the credit of an action to which the trustee is a party.

NORTH, J.:—

I think the trustee is entitled to her costs; she is a party to the action, and she must have been served with the petition. In *Haynes* v. *Barton* (2) and in *Henniker* v. *Chafy* (3), in each of which land taken by a railway company was the subject-matter of a suit, it was held that the parties to the suit were entitled to appear on the hearing of a petition dealing with a fund in Court, and that the company must pay their costs of appearance. In both those cases *Sidney* v. *Wilmer* was cited. Whether the Taxing Master will allow the costs of two counsel I do not know.

Solicitors: *John Nicholls & Co.; R. Ward; R. N. Appleyard.*

(1) 31 Beav. 338. (2) Law Rep. 1 Eq. 422.
(3) 35 Beav. 124.

W. L. C.

WHITE *v.* CITY OF LONDON BREWERY COMPANY.

NORTH, J.

1888

July 24, 25.

[1880 W. 0385.]

Mortgagee in Possession—Public-house—Account—Trade Profit.

Mortgagees in possession of a public-house let the premises with a restriction that the tenant should take beer of their brewing and none other:—

Held, that the mortgagees must account for such additional rent as might have been got if the premises had been let without restriction: but not for profit made by the sale of beer to the tenant.

THIS was an action by a mortgagor for an account against first mortgagees, a brewery company, who had sold the mortgaged premises, and a second mortgagee.

By deed dated the 4th of February, 1868, the Plaintiff mortgaged to the Defendants, the *City of London Brewery Company*, a public-house held by him for a lease of fifty years from June, 1861, at the annual rent of £60, the house being in his own occupation.

The mortgage was to secure a sum of £700 and further advances. It was provided that the total amount to be recovered by the company under the mortgage should not exceed £900. In September, 1869, interest being in arrear, the Defendant company entered into possession. They obtained from the Plaintiff a transfer of his licenses. They put their own furniture in and carried on the business of publicans by a manager named *Moulton*.

In March, 1871, they let the premises to *Moulton* at a yearly rent of £15 for the house and £15 for the furniture under an agreement which contained a stipulation that the tenant would "keep a sufficient stock of porter, ale, and beer for sale therein of the brewing of the said company and none other." The company, under the agreement, did all the repairs. In September, 1873, *Moulton* gave up his tenancy, and the company let the premises to one *Hake* for £60, the landlord doing all the repairs, under an agreement which contained a stipulation tying the

NORTH, J. 1888 WHITE v. CITY OF LONDON BREWERY COMPANY.

tenant to take his porter, ale and beer, except *Burton* ales, from the company.

In September, 1879, the company, in exercise of a power in their mortgage, sold the premises for £2650. On the 24th of November, 1879, the purchase was completed. They retained the amount they claimed to be due to them for principal, interest and costs, and paid the balance to the second mortgagee.

At the trial an order was made for—1. An account of what was due to the Defendant company under the mortgage deed. 2. An account of sums laid out by them in necessary repairs and lasting improvements; and that interest should be computed on such sums. 3. An account of the rents and profits received by the company or which but for their wilful default might have been so received; and 4. Without prejudice to any question in the action, an inquiry as to what profits were made by the company during the time they carried on the business, and what sums ought to be allowed them for skilled labour and expenses out of pocket in carrying on the business.

The Chief Clerk certified that there was due to the mortgagees under the mortgage at the time of completion of the sale £1415 17*s.* principal and £615 15*s.* 3*d.* interest. The £1415 17*s.* comprised the £700 due at the date of the mortgage, £88 for beer supplied, some small sums amounting to £12 paid to the mortgagee, and money out of pocket for head rent and insurance. The Chief Clerk certified that the mortgagees had expended on repairs and lasting improvements sums amounting to £380 4*s.* 9*d.*, and computed the interest thereon at £96 2*s.* 4*d.* He found the mortgagees accountable for £396 9*s.* 10*d.* in respect of rents, and that the carrying on of the business by the mortgagees on their own account resulted in a loss. The ultimate result of the account was that the mortgagees owed the second mortgagee the sum of £18 11*s.* 11*d.*

The action was now brought on on summons to vary the Chief Clerk's certificate and further consideration. The Plaintiff sought to charge the mortgagees with a sum of £1991 18*s.* 9*d.* as profits of the sale of beer to their tenants *Moulton* and *Hake*, or, in the alternative, to charge them with a higher rent than had been received from *Moulton* and *Hake*.

Cozens-Hardy, Q.C., and *A. àB. Terrell*, for the Plaintiff and second mortgagee:—

The mortgagees ought to be surcharged with all the profits made out of the beer supplied to the tenants under the contracts to take the beer of the mortgagees' brewing and none other. They got those profits from their position as mortgagees in possession, and a mortgagee is not allowed to get any advantage out of the mortgaged property beyond principal, interest, and costs: *Gordon* v. *Lewis* (1); *Gubbins* v. *Creed* (2); *Warner* v. *Jacob* (3); *Chaplin* v. *Young* (4).

If the mortgagees are not to account for the trade profits gained under the contracts which tied the house, they ought at least to be charged with such rent as they might have obtained by letting the house free. It is clear from the evidence and the nature of the case that a larger rent could have been obtained if the house had been let free.

Napier Higgins, Q.C., and *J. D. Fitzgerald*, for the *Brewery Company*:—

The profits made by the sale of beer were not derived out of the mortgaged premises. A mortgagee is not prevented from making a profit out of a collateral contract or dealing with the mortgage, though he may have done what he has done by virtue of the position he was in as mortgagee. In *Robertson* v. *Norris* (5) a mortgagee in possession of a newspaper was not allowed to charge credit prices for work and material, but he was allowed to charge cash prices and get the same profit as he got out of dealings with customers who paid cash. In *Dobson* v. *Land* (6) Vice-Chancellor *Wigram* draws the distinction between a trustee and mortgagee. He points out that a second mortgagee can buy up a first mortgagee and charge the mortgagor what was owing to the first mortgagor, though he may have paid little or nothing for it, and says there are many other cases in which a mortgagee can derive a profit. As to rent, the evidence shews that the mortgagees did get the best rent they could, and that even

(1) 2 Sumn. Circuit Rep. 143.
(2) 2 Sch. & Lef. 214.
(3) 20 Ch. D. 220.
(4) 33 Beav. 414.
(5) 1 Giff. 428.
(6) 8 Hare, 216, 220.

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if a higher rent could have been got, having acted fairly in the way they thought best and most likely to enhance the value of the mortgaged property they are not chargeable with anything further. The mortgagee is not usually required to account for more than he has actually received unless it can be proved that but for his gross default, mismanagement, or fraud, he might have received more: *Fisher* on Mortgages (1); *Brandon* v. *Brandon* (2); *Hughes* v. *Williams* (3). The mortgagor has stood by and cannot now get extra rent: *Millett* v. *Davey* (4).

Terrell, in reply:—

The profits on the sale of beer were in effect profits from the sale of the beer on the premises, and therefore derived directly out of the mortgaged hereditaments.

NORTH, J.:—

A claim is now made by the mortgagor that from the time when the mortgagees let the property to their manager in 1871 they should be charged with not only the rent that they received from him, but also with all the profits they made by the supply of beer to him during that period, the agreement with the tenants respectively stipulating in each case that the tenant should take the beer from the mortgagee.

Now, in my opinion, they are not entitled to any such claim in respect of profits. In the first place I do not think it is within the terms of the decree. The inquiry is directed during the period when the mortgagees were themselves in possession by their agent of what profits were made by the Defendants, but that is during that particular period, and no other time, and the silence of the decree in directing any inquiry as to what profits were made by the Defendants after that time when they had a tenant in possession of the property is very noticeable. It is quite true that there is another inquiry which asks for "an account of the rents and profits of the mortgaged hereditaments received by the Defendants or by any other person or persons by or for the use of the Defendant company." But those are not accounts of

(1) 4th Ed. s. 1454.
(2) 10 W. R. 287.
(3) 12 Ves. 493.
(4) 32 L. J. (Ch.) 122.

profits made by the Defendants by the sale of beer, or anything like it. It is in respect of the mortgaged hereditaments, with which the supply of beer had nothing whatever to do. Therefore we have got the inquiry confined to the rents and profits of the hereditaments after the letting in 1871, and it is only before the letting in 1871 that there is an inquiry as to the profits made by the Defendants. For the purpose of charging the Defendants, as is now sought to be done, it would be necessary to have an account of the profits they have made since that time, and I have no materials before me to say what they are.

In my opinion, therefore, the profit, such as is suggested here, cannot be charged against the Defendants, as it is not within the terms of the decree. But if this were the trial of the action, and I was considering in what terms the decree should be made, I do not think it ought to have contained any declaration for any account of those profits made by the Defendants. The decree is in common form—the rents and profits of the mortgaged hereditaments, and nothing else, and these profits, in my opinion, are not rents and profits of the mortgaged hereditaments.

Gubbins v. *Creed* (1) was cited, but that case, which related to an advowson, has no application to the present.

The other case that was cited to me was one from the American authorities, but that does not seem to me to go any further than many English authorities do, because all that was said there was this (2): "No principle was better established than the principle, that a mortgagee shall not get any advantage out of the mortgage fund beyond his principal and interest. Between mortgagor and mortgagee, the latter, when in possession, must account for the actual rents and profits received or made by him, if these rents and profits can be actually ascertained. Where they cannot be, there must be a resort to a fair occupation rent." Here the Master has ascertained the actual rents and profits. There is nothing new in that, and nothing in that applies specially to the present case.

If the Plaintiff were right here he would be entitled also to the rent received by the Defendants in respect of the furniture

(1) 2 Sch. & Lef. 214. (2) 2 Sumn. Circuit Rep. 155.

NORTH, J. 1888 WHITE v. CITY OF LONDON BREWERY COMPANY.

that they let to the tenant, and I cannot imagine any reason upon which they should so be held liable. That is not earned by a letting of the mortgaged premises in any sense. It is a collateral matter altogether, wholly apart from the disposition of the mortgaged premises, which, as far as that went, might have been let either furnished or unfurnished.

In *Robertson* v. *Norris* (1) the case came very near the present, but it is not an authority that is of much use, because, as far as the report shews, the point was not raised. Mr. *Terrell* says it may have been raised, but I cannot assume that. If it had been, it would have been a stronger authority against him than it is at present.

Taking another illustration, which was suggested by Mr. *Terrell*. Supposing the trustee were to let part of the trust property, reserving the shooting to himself, what would he have to be charged with? Of course, he could not keep the shooting without payment. That was established in a case before Lord *Eldon*, and it is clear he could not; but he would have to be charged with something. What would he be charged with? In my opinion, the right thing to charge him with would be what he would have got, if, instead of keeping it himself, he had let it to somebody else; and it would be wrong to say that he should be charged with the amount he might have received from the letting, or the sum for which he might have sold the dead game, whichever happened to be the higher of the two.

But those are all collateral matters, and I think they cannot be within the observations of the Vice-Chancellor in the case of *Dobson* v. *Land* (2), cited by Mr. *Higgins*. There the Judge was comparing the position of mortgagee and trustee, and pointing out that they differ in some respects. He says: "A trustee can never make a benefit to himself by any dealing with the trust property; but if a second mortgagee should buy in the first mortgage for half its amount, or even obtain an assignment without consideration from the first mortgagee, I can have no doubt he would be entitled to charge the mortgagor the full amount of the first mortgage in addition to his own." Why, if the Plaintiff

(1) 1 Giff. 428. (2) 8 Hare, 220.

is right? He there buys in the first mortgage clearly because he is second mortgagee. No one could doubt that was the reason for paying off the first, and taking it up himself; yet because he has done so by reason of his position as second mortgagee he is not accountable for any profit he might make between the difference of the price he pays and the amount he might afterwards make. Then the Vice-Chancellor proceeds: "And other cases of a like kind might be put. This destroys the integrity of the proposition contended for by the mortgagee; and I confess I have great difficulty in seeing why a mortgagee should not, as between himself and the mortgagor only, be allowed to make any contract he pleases, collateral to and not affecting the mortgaged premises." I have no doubt how the Vice-Chancellor would have dealt with this case if he had it before him. No doubt he would have held, as I do, that the sum received by way of profit on the sale of beer was not a sum for which the mortgagee was accountable to the mortgagor.

But that does not quite dispose of the whole case. The tenancies created by the mortgagee were in each case tenancies by which the tenant was to take all his beer from his lessor. Now I am not going to comment upon the evidence in detail; but there is plenty of evidence addressed to a point upon which I do not feel any doubt myself, that a lease or a tenancy of property subject to taking the supply of beer from the lessor is less beneficial and less advantageous than one in which the lessee can take his beer from any person he pleases. As I said, there is plenty of evidence on the point. There is another thing which seems to me strongly to point the same way. What is the use of the requisition invariably insisted upon by a lessor under those circumstances, that the lessee shall come under the obligation, if there is anything in the contention that he is sure to do it whether he is under the obligation or not? The fact that the obligation is insisted on by lessors is a strong circumstance to corroborate the evidence of those persons who say that a tenancy subject to the obligation is of less value than one which is free.

The mortgagees, therefore, in this case, have made a lease subject to a condition in their own favour, and I am satisfied

NORTH, J. 1888 WHITE v. CITY OF LONDON BREWERY COMPANY.

upon the evidence that that lease was one which, by virtue of the provision in their own favour, was less beneficial to the mortgagor than it would have been if that term had not been in it. [His Lordship shortly considered the evidence bearing on this point, and proceeded :—]

In my opinion, therefore, the mortgagees have not been charged with as high a rent as they ought to have been charged with.

The conclusion I come to, dealing with the matter to the best of my judgment, and having given a great deal of attention to it, is, that I think a rent of £80 a year from August, 1874, down to the time of letting will do justice between the parties. I do not say that if the matter had been very strictly weighed I ought not, perhaps, to give some slight increase of rent earlier than that date, and I am not sure that I ought to give quite so much afterwards. But the best conclusion I can come to is, that I shall have done what is fair to the mortgagor if I direct that the rent payable from August, 1874, down to the time of the letting is £80 instead of £60.

Solicitors for Plaintiffs and Second Mortgagee : *Carr & Co.*
Solicitors for Defendant Company : *Western & Sons.*

D. P.

NORTH, J.
1888
July 28.

In re TALBOTT.
KING *v.* CHICK.

[1886 T. 1488.]

Administration—Insolvent Estate—Interest on Debt—Secured Creditor—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10 [*Revised Ed. Statutes, vol. xvii. p.* 740].

In the administration of an insolvent estate, a mortgaged property of the testator having been sold in the administration action, and the proceeds of sale paid into Court:—

Held, that the mortgagee was entitled to have the proceeds of sale applied first in payment of interest on the mortgage debt down to the date of payment, and then in payment of principal, and to prove against the estate for the unpaid balance of principal, but that the amount of the proof could not exceed the amount of principal due at the date of the judgment in the action.

In re Summers (1) distinguished.

FURTHER CONSIDERATION.

The action was by an equitable mortgagee, by deposit of deeds, with memorandum of deposit, of *H. J. Talbott*, deceased, to establish his mortgages; for an account of what was due to him for principal, interest, and costs; for sale of the mortgaged properties; for a declaration that, in case the proceeds of sale should be insufficient to pay the amount due to the Plaintiff, he was entitled to receive satisfaction out of the assets of the mortgagor; administration, if and so far as necessary, of the real and personal estate of the mortgagor; and the appointment of a receiver of the rents and profits of the mortgaged properties.

The Plaintiff claimed to be a mortgagee in respect of two sums of £1600 and £1400, each of which was also secured by a promissory note of the mortgagor.

The Defendants were, the executrix of the mortgagor, and the tenant for life under his will of part of his real estate.

By the judgment at the trial, on the 15th of January, 1887, it was declared that the Plaintiff was entitled, by virtue of the deposit of deeds and memorandum of deposit, to an equitable lien or charge on the mortgaged properties, for securing to him the amount which should be found due to him in respect of principal,

(1) 13 Ch. D. 136.

NORTH, J. 1888 ~~ *In re* TALBOTT. KING *v.* CHICK.

interest, and costs. A receiver was appointed, and the ordinary mortgage accounts were directed to be taken, and it was ordered that the mortgaged properties should be sold, free from the Plaintiff's charge, and the proceeds of sale paid into Court. And it was declared that, in case the proceeds of sale should be insufficient to pay the amount due to the Plaintiff, he was entitled to receive satisfaction out of the assets of the mortgagor in a due course of administration. And, the executrix requesting an order for the administration of the testator's real estate (other than the mortgaged properties) and the personal estate of the testator, an administration order thus limited was made, without prejudice to the prior order and the Plaintiff's rights thereunder.

The Chief Clerk by his certificate, dated the 12th of June, 1888, found that there was due to the Plaintiff £3277 13*s.* 9*d.* for principal and interest from the 6th of October, 1885, to the 17th of January, 1888, and £37 5*s.* 6*d.* for subsequent interest to the date of the certificate. The properties mortgaged to the Plaintiff had been sold, and the proceeds of sale, amounting to £1045, had been paid into Court. After deducting the £1045 (proceeds of sale) and £42 9*s.* 1*d.* (rents and profits received by the Plaintiff from the Defendants), there remained due to the Plaintiff £2190 4*s.* 8*d.*, and £37 5*s.* 6*d.* for subsequent interest. The testator's personal estate being insufficient for the payment of his debts in full, interest on the debts had not been computed, pursuant to the General Orders.

The action now came on for further consideration.

The minutes of the order, as proposed by the Plaintiff, provided for the payment to him of the proceeds of the sale, in satisfaction *pro tanto* of the amount found due to him. And, "it appearing that the assets of the testator will be insufficient for payment of his debts and funeral expenses in full," a taxation of the costs of the Plaintiff and the executrix, as between solicitor and client, was directed. The minutes went on to direct that subsequent interest should be computed on such of the debts mentioned in the schedule to the certificate as by law carried interest, from the date of the certificate to the day of payment, credit being given for any sum which should be paid to the Plaintiff under the directions thereinbefore contained. And, after providing for the

payment of the taxed costs of the Plaintiff and the executrix out of other funds in Court, the minutes directed that the residue should be apportioned among the creditors of the testator named in the schedule to the certificate, rateably in proportion to the amounts which should be certified to be due to the creditors whose debts by law carried interest in respect of their debts and interest, and to the principal sums appearing by the certificate of the 12th of June to be due to the creditors whose debts did not by law carry interest.

Quin, for the Plaintiff.

Swinfen Eady, for the Defendants:—

Interest on the mortgage debts ought to be calculated only down to the date of the judgment. By sect. 10 of the *Judicature Act*, 1875, the rule in the administration of an insolvent estate is assimilated to the rule in bankruptcy, the administration judgment being equivalent to the adjudication in a bankruptcy, and in bankruptcy, unless there is a surplus, a creditor is entitled to prove for interest only up to the date of the adjudication: *In re Summers* (1).

[NORTH, J.:—A mortgagee is entitled to apply the proceeds of his security first in payment of the interest due to him, and then in payment of the principal, and then he can prove against the mortgagor's estate for the unpaid balance of the principal.]

He cannot indirectly increase the amount for which he is entitled to prove against the estate; it is only as against the security that he is entitled to payment of interest first. If the interest is calculated down to the date of payment, and retained out of the proceeds of sale, the Plaintiff will be indirectly proving against the insolvent estate for interest subsequent to the date of the judgment. He is not entitled to prove against the estate for anything more than he could have proved for at the date of the judgment.

NORTH, J.:—

In my opinion the Plaintiff is entitled to be paid out of the proceeds of the security the amount which is due to him in

(1) 13 Ch. D. 136.

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1888
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respect of his security, including interest down to the present time, the proceeds being applied first in payment of interest, and then in payment of principal. For any balance of principal which may remain due to him, after this application of the proceeds of the security, he will be entitled to prove against the testator's estate, but without interest. If the proceeds of sale are more than enough to pay the interest, the estate will get the benefit of the surplus. If the proceeds of sale are exactly equal to the interest, the mortgagee is entitled to retain the whole for interest. If the proceeds of sale were less than the amount of interest, the mortgagee would have to put up with the loss of the difference. In the present case the proceeds of sale will exceed the amount of the interest, and he will be entitled to prove against the estate for the unpaid balance of the principal. I fully recognise the rule which was laid down in *In re Summers* (1); but I do not think that it governs the present case. The amount for which the Plaintiff is entitled to prove will be less than the amount of principal which was due to him at the date of the judgment.

Minute of order as drawn up by the Registrar:—

Interest from the 15th of January, 1887, the date of the judgment, to be computed on the principal moneys secured by the Plaintiff's securities up to the 28th of July, 1888, and the total amount of interest accrued and unpaid or unsatisfied to be certified. The proceeds of sale in Court to be paid to the Plaintiff, and to be deemed to have been applied in the first instance in satisfaction of the amount of interest which shall be certified to have accrued as aforesaid in respect of the Plaintiff's securities respectively up to the 28th of July, 1888, and then in reduction of the principal moneys owing in respect of such securities respectively. Ordered that the respective amounts of such principal moneys then remaining unsatisfied (not exceeding in any case the amount of the principal due at the date of the judgment) be certified. Ordered that the residue of the funds in Court mentioned in the 3rd schedule to the order (*i.e.*, proceeds of the testator's personal estate), after payment of taxed costs, be apportioned according to the amounts certified to be due to the Plaintiff and the other creditors mentioned in the Chief Clerk's certificate.

Solicitors: *W. T. Howard; Crossfield, Son, & Cushing.*

(1) 13 Ch. D. 136.

W. L. C.

In re ARGUS LIFE ASSURANCE COMPANY.

NORTH, J.

1888

Aug. 1, 2, 3.

Life Assurance Company—Deed of Settlement—Power to alter— Sale of Business.

The deed of settlement of an unincorporated life assurance company contained no provision for the sale or transfer of its business. But it provided that the proprietors might alter, amend or repeal the laws, regulations and provisions of the company. Resolutions were passed with due formalities to take power to sell and transfer the business:—

Held, that a sale and transfer of the business was *intra vires*.

THIS was a petition under the *Life Assurance Companies Acts*, 1870 and 1872, by the directors of the *Argus Life Assurance Company* (called in this report the *Argus*) to obtain the confirmation by the Court of an agreement for the sale and transfer of the business and liabilities of the *Argus* to the *Imperial Life Assurance Company* (called in this report the *Imperial*).

The *Argus* was an unincorporated company, formed under a deed of settlement dated December, 1833. The existing issued capital consisted of 2800 £100 shares, on which £30 was credited as paid up, partly from money paid and partly from profits accumulated. The *Argus* were empowered by Act of Parliament to sue and be sued in the name of any director, or of the chairman or secretary.

The deed of settlement of the *Argus* as originally executed contained no provision relating to the distribution of profits among participating policy-holders. The company during the period in which it continued to grant new policies had issued circulars which stated that participating policy-holders received nine-tenths of the profits of the bonus business, and it was admitted that the policy-holders were entitled to that proportion of the profits derived from the business of the participating policies, ascertainable every five years. It was the practice of the company to give the bonuses by way of a payment in cash proportionate to the premiums during the previous five years, or by an equivalent addition to the sum insured irrespective of premium, at the option of the assured. On the 31st of March, 1887, the date at which the transfer of the business of the *Argus* mentioned was to

NORTH, J. 1888 *In re* ARGUS LIFE ASSURANCE COMPANY.

take effect, the amount insured in the *Argus* with participation was about two-fifths of the total amount insured.

The following were three of the articles of the deed of settlement of the *Argus*:—

"19. That three-fourths of the votes of the qualified proprietors present at two successive extraordinary general meetings specially called for the purpose, or at the ballots or ballot which may be taken in consequence of being demanded at such meetings, or either of them, shall be requisite to make new laws, regulations, and provisions for the company, or to dissolve the company.

"28. That two successive extraordinary general meetings, specially called for the purpose, shall have full power to make any new laws, regulations, and provisions for the company, or to amend, alter, or repeal, either wholly or in part, all or any of the existing laws, regulations, and provisions of the company.

"29. That two successive extraordinary general meetings, specially called for the purpose, shall have full power to come to a resolution to dissolve the company, provided such dissolution shall have been previously approved of and recommended by the board of directors, but not otherwise."

By clauses added to the deed of settlement of the *Argus* pursuant to resolutions duly passed and confirmed at two successive extraordinary general meetings of the proprietors of the *Argus* specially called for the purpose and held respectively on the 22nd day of September and the 13th day of October, 1887, it was provided as follows:—

"That it shall be lawful for the board of directors to recommend a sale or transfer of the business and liabilities of the company to any other company associated for like purposes and carrying on the business of a life assurance company, to take effect from such date as to the board may seem proper, and either upon the terms of such other company or the directors or trustees thereof undertaking to satisfy the liabilities of this company in respect of assurances, annuities, or other engagements, when and as the times for satisfaction thereof shall arise, and accepting a transfer of so much of the funds and property of this company as may be agreed on between the contracting parties as sufficient to

enable such other company to comply with such undertaking, or upon such other terms and on such conditions in all respects as the board of directors may think fit, and the board of directors may authorize any one of their number to sign and execute any provisional agreement which they may think proper for carrying such sale or transfer into effect.

"That an extraordinary general meeting specially called for the purpose may, with the assent of three-fourths of the votes of the proprietors present and voting at such meeting, resolve that the business and liabilities of this company shall be sold or transferred to any such other company as aforesaid upon such terms as shall have been previously approved of and recommended by the board of directors, with such modifications (if any) as such extraordinary general meeting shall determine, and may authorize the board of directors to carry into effect such resolution and any provisional agreement for such sale or transfer either with or without modifications as aforesaid."

The *Argus* ceased to grant policies in the year 1867, consequently the business became diminished, and in the year 1886 the directors submitted their affairs to an independent actuary, who advised that the best course would be to negotiate for the transfer of the business to another company, and that such transfer might be made on terms that would be advantageous to both parties.

An agreement, dated May, 1888, was made between three of the directors of the *Argus*, acting on behalf of their company, and three of the directors of the *Imperial*, acting on behalf of their company. The agreement was made subject to the approval by the resolutions of the *Argus* mentioned below, and necessary resolutions by the *Imperial*, which were duly passed, and to the confirmation by the Court. The agreement provided that the *Argus* should transfer and the *Imperial* should take over the business and the assurance and annuity liabilities of the *Argus* from midnight of the 31st of March, 1887.

A term of the contract was: "The *Imperial* shall, on the 1st day of February, 1891, either pay or allow, as hereinafter mentioned, to each participating policy-holder of the *Argus* whose policy shall be then in force a cash bonus of 20 per cent. on the

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premiums paid in respect of such participating policy between the 1st day of April, 1887, and the 31st day of January, 1891, both inclusive, and the *Imperial* shall, at the expiration of each period of five years from the 31st day of January, 1891, pay or allow to each participating policy-holder of the *Argus* whose policy shall at the expiration of such period be in force, a like cash bonus of 20 cent. on the premiums paid in respect of such participating policy during such period of five years: Provided always, that any participating policy-holder who has hitherto elected to take his quinquennial bonuses by way of an equivalent reversionary addition to the sum assured, or by way of an equivalent reduction of premium for the next following five years, shall be entitled and shall continue to receive his bonuses in the same way in future, and the *Imperial* shall pay to the owners or owner of any participating policy in the *Argus* which shall have become a claim (1) between the 1st day of April, 1887, and the 31st day of January, 1891, both inclusive, or (2) during the currency and prior to the expiration of such subsequent period of five years, a cash bonus of 15 per cent. of the annual premium paid for each year of risk fully completed after the next following renewal date in respect of such participating policy in the first case, since the 31st day of March, 1887, or, in the second case, since the date of the last previous quinquennial valuation up to the date at which such participating policy shall become a claim."

At an extraordinary general meeting of the proprietors of the *Argus* specially called for the purpose held on the 24th of May, 1888, a resolution was duly passed "that the business and liabilities of this company be sold and transferred to the *Imperial Life Assurance Company* upon the terms of" the agreement of May, 1888, above-mentioned, "and that the directors of the *Argus Company* be and they are hereby authorized to apply to the High Court of Justice for its sanction to the said agreement, and to carry the same into effect."

The agreement was founded upon the actuarial reports made by the actuaries of the *Argus* and *Imperial* companies respectively shewing the principles and *data* upon which the terms of the agreement had been arranged. And a statement of the nature of the proposed transfer, together with an abstract of the agreement

and the actuarial reports, had been forwarded to each policy-holder of the *Argus* in manner prescribed by the *Life Assurance Companies Act*, 1870, and all the requirements of sect. 14 of that Act had been duly complied with. Only one policy-holder sent in a dissent.

The petition was opposed by Mr. *Pedley*, the holder of three participating policies. He had filed an affidavit setting forth the facts on which he grounded his opposition. The affidavit shewed that an attempt had been made to sell the business of the *Argus* to the *Eagle Life Insurance Company* in the year 1862, but the transaction had then been held to be *ultrà vires*: *Kearns* v. *Leaf* (1); that in the year 1866 an unsuccessful attempt was made to procure an Act of Parliament to make over the business and assets of the *Argus* to the *Commercial Union Insurance Company*.

Mr. *Pedley* also objected on the ground that the proprietors had, as he contended, received larger dividends than they ought to have, instead of accumulating their profits and enlarging the guarantee fund; and that it was intended if the sale and transfer were carried out to apply the surplus assurance fund beyond the price to be paid to the *Imperial* in an improper manner.

Crackanthorpe, Q.C., and *W. G. Robinson*, for the petitioning company:—

Independently of the restrictions imposed by the *Life Assurance Companies Act*, 1870, the *Argus Company* have power to bind their policy-holders by a sale and transfer of its business and assets, for though the company had not by its original constitution power to sell its business, its deed of settlement contained power to alter its provisions, and the provisions of the deed of settlement have been duly altered so as to give such power of sale and transfer, and it has been decided that such an alteration in the case of a life assurance company is within a power to alter the provisions: *Doman's Case* (2). All the requirements of the *Life Assurance Companies Act*, 1870, have been complied with, and the evidence shews that it would be beneficial for all parties that the arrangement should be sanctioned by the Court.

(1) 1 H. & M. 681. (2) 3 Ch. D. 21.

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Cozens-Hardy, Q.C., and *Daniel Jones*, for the *Imperial Company*.

Napier Higgins, Q.C., and *Grosvenor Woods*, for Mr. *Pedley*:—

In the first place the company not having express power by its original constitution to sell its business could not bind non-assenting policy-holders, as was decided in the case of this very company: *Kearns* v. *Leaf* (1). The policy-holder entered into his contract on terms that the company had no power to hand his contract over to a third person, and by *ex post facto* resolution they could not against his consent impose upon him a liability to be handed over to any other company. The case, *Doman's Case* (2), relied on was a case between shareholders. In *Cocker's Case* (3) a policy-holder was held to be bound because, and because only, the company had power to sell and transfer when the policy was taken out, and this policy was expressly made subject to the deed of settlement which contained such power.

The provisions of the deed of settlement are to be taken strictly against the company, and the absence of power of sale and transfer of business in the provisions of the company's deed at the date of the policy amounts to a contract not to sell: *Wood's Case* (4).

We also submit that if the *Argus Company* have a legal power to sell their assets and business Mr. *Pedley* has made out that it would be unjust under the circumstances to carry out such transaction, and he is entitled to that protection which the *Life Assurance Companies Act*, 1870, empowered the Court to give him by withholding its sanction.

The proposed arrangement would put the participating policy-holders in a different position from that which they contracted to hold; they contracted to take a share of profits. The arrangement proposed as to bonuses is that they shall have a fixed bonus of 20 per cent.; that is an arrangement that cannot legally be forced upon them, and if legal the Court would not sanction it as just.

Maidlow, for a participating policy-holder who did not oppose.

(1) 1 H. & M. 681.
(2) 3 Ch. D. 21.
(3) 3 Ch. D. 1.
(4) Reilly's Albert Arbitration Cases, 54.

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This is a petition to obtain the approval of the Court to an arrangement by which the business of one life assurance company is proposed to be transferred to another. The business to be transferred is that of the *Argus Company*, a company which was formed in 1833, and has 2800 shares of £100 each, £30 a share being paid up, and the amount uncalled being £196,000.

In or about the year 1862, they proposed to transfer the business of the *Argus Company* to another company. That was restrained, not in terms, but in effect, by a decision of Vice-Chancellor *Wood*. They afterwards endeavoured to attain the same object by a bill in Parliament; but that was not passed. Then in 1867, after that had been done, the company ceased to carry on an active business; that is to say, they ceased to issue new policies; although of course they had to carry on business for the purpose of receiving the premiums, and satisfying claims in respect of policies already existing. In the months of September and October, 1887, they, by resolution duly passed, altered the provisions of their deed of settlement; and then, for the first time, put themselves in a position for agreeing with another company for the transfer of their business to such other company. The deed having been so altered, an agreement was entered into on the 3rd of May, 1888, between the *Argus Company* on the one hand and the *Imperial Company* on the other, arranging for the transfer of the business of the former to the latter. That was submitted to a general meeting of the persons interested in the *Argus*, and it was approved. I should say it was also approved in the usual way by the persons interested in the company to which the transfer was to take place.

The next step is the application to the Court under the 14th section of the *Life Assurance Companies Act*, 1870, which provides that, when it is intended to transfer the life assurance business of any company to another, the directors of either company may apply to the Court by petition to assent to the proposed arrangement, notice of such application being published in the *Gazette;* and then the section provides for bringing the matter before the persons interested in a formal way. It says, "Before any such application is made to the Court, a statement of the nature of . . .

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the transfer . . . together with an abstract containing the material facts embodied in the agreement or deed under which such . . . transfer is proposed to be effected, and copies of the actuarial or other reports upon which such agreement or deed is founded, shall be forwarded to each policy-holder . . . of the transferred company in case of transfer, by the same being transmitted" in the way required by the section, "and the agreement or deed under which such . . . transfer is effected shall be open for the inspection of the policy-holders and shareholders at the office or offices of the company or companies for a period of fifteen days after the issuing of the abstract." All those things were duly done. Then the section provides, taking up the earlier part which I passed over for the moment, that after those things have been done, "The Court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may confirm the same if it is satisfied that no sufficient objection to the arrangement has been established."

Now the clear object of that is to bring before all the parties what is proposed before the application is made to the Court; and then to give those parties the opportunity of appearing and expressing their views before the Court, which has power to hear the directors and any other persons it considers entitled to be heard; and then there is an important provision, the effect of which I think has been overlooked by the counsel for Mr. *Pedley* —the provision is that the Court, "may confirm the same if it is satisfied that no sufficient objection to the arrangement has been established."

Now, on the present occasion, there is in fact only one person who appears to oppose it. A second policy-holder has appeared, and does not oppose. The one who does oppose is Mr. *Pedley*, a solicitor, who has three policies, granted in the years 1857 and 1858, for sums amounting to £3300, with such bonuses as have accrued in respect of those policies. He has made an affidavit in which he sets forth what his complaints are, and they come under two heads: first, he says, that there have been considerable misapplications of the funds of the company in the past; and secondly, he says, that whereas the agreement provides for handing over a portion of the assets to the *Imperial*, the company

which is taking the transfer, that will leave a considerable surplus of funds, and a misapplication is intended with respect to those funds. Those are the two points to which he addresses himself in his affidavit, and if I sanction the agreement it will leave any ground of complaint he may have, if any, upon either of those points completely open to him. The present contention set up by his counsel at the Bar is something different. It is said, first of all, that what is done is a breach of the contract with the policy-holder: that the company has no power to make the transfer, and that it would be a fraud upon the policy-holder if it were to do so, and to hand over the assets to another company; and the decision in *Kearns* v. *Leaf* (1), which related to this company itself at an earlier stage, is relied upon. Since that time the condition of the company has been completely altered by the alterations in the deed; and whereas they had not at that time under their deed power to transfer to another company, they have since altered the deed, which now does authorize a transfer to another company, subject of course to the requirements of the 14th section being complied with.

But then it is said that it is illegal still, and for this reason, that Mr. *Pedley* effected policies with a company which had no power to amalgamate, and that the company can do nothing afterwards which can have the effect of putting him in a different position from that in which he would have been if no alteration in this deed had subsequently been made. That point seems to me entirely disposed of by the decision of Lord *Cairns* and Lords Justices *James* and *Baggallay* in *Doman's Case* (2). It is said that that was a question relating to a shareholder, and not to a policy-holder; but, as bearing upon the point the Court had to decide, the position of a policy-holder was, as the report shews, fully argued and pressed upon the Court; and the Court deals with that argument, and describes what, in its opinion, the position of a policy-holder is; and that case, upon which, so far as I am aware, no doubt has ever been thrown since that time, establishes that if a policy-holder effects a policy with a company which has not at the time power to transfer its business, but has provisions in its deed under which

(1) 1 H. & M. 681. (2) 3 Ch. D. 21.

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it may acquire that power, the policy-holder has no ground of complaint if it does use and exercise the powers conferred upon it, and take the power afterwards to make such a transfer. In the present case the policy is expressly made subject to the provisions of the deed of settlement, and in my opinion *Doman's Case* (1) is conclusive upon this point, that they can legally do what they are proposing to do.

Then the second point raised is this: that what is proposed is inequitable; that is to say, it is not illegal in the sense with which I have just dealt, but is of such a nature that the Court ought, in the exercise of its discretion, to refuse to sanction the agreement. Now the agreement as it stands must be accepted or rejected: it is not possible for me to sanction it subject to any terms or conditions, because it has to be submitted to the shareholders—certain notices have to be given; and it is only after the persons interested in the companies have considered their position that the matter comes before the Court. I cannot possibly deal with anything excepting what has actually come before the company.

Then the principal ground, and what I think is the strongest ground upon which an objection can be made is this. Mr. *Pedley* is a participating policy-holder; and under his arrangement with the *Argus*, and under the proposed arrangement with the *Imperial*, the bonuses which are to accrue in the future in respect of his policy are not the subject of an option as to how he will take them, but have to continue as heretofore to be added to the amount ultimately payable on the policy. Then it is said that under the proposed arrangement there is to be a fixed bonus of 20 per cent.; and it is said that is not exactly the same as he would have got if the transfer had not taken place. Now, with respect to that, I do not see any material difference, because it appears that about 20 per cent. is what has actually been received at past quinquennial divisions of profits in respect of the policies that were effected under circumstances like Mr. *Pedley's* during the past life of the society; and, as regards this point, although I think it is deserving of consideration, in fact, I think it is the strongest point that can be put by the counsel for Mr. *Pedley*—yet

(1) 3 Ch. D. 21.

in considering the point, I have the fact that no other policy-holder out of a very large number has made any objection to it. And, what is more, Mr. *Pedley* himself has not made any objection to it; because his objections in his affidavit are put, as I have said, upon a different ground. In my opinion, therefore, there is nothing in this point, strenuously argued as it was by counsel, to which I can give any weight in saying that the agreement is not one which ought to be sanctioned.

Then it is said also on behalf of Mr. *Pedley* that there is a considerable hardship in sanctioning an arrangement by which the company with which he had contracted is allowed to transfer its business and its contract to another company. The contract is only transferred in a certain sense: the contract with the *Argus* still stands: it is not put an end to. The property is handed over to the *Imperial*; and they take upon themselves, also, the duty of satisfying the policy. As regards the point about its being a hardship, the observations that were made by Lord *Cairns* in *Hort's Case* and *Grain's Case* (1), are very important as shewing that though there are certain things which may be said on one side pointing to the inconvenience of allowing such a transfer, on the other hand there is a great deal to be said in favour of allowing it; and there is no hardship, as he points out, in coming to the conclusion that a policy-holder has entered into an arrangement of this sort with his eyes open.

Then there was a further point pressed upon me. It was said that the evidence which has been produced is not sufficiently strong affirmative evidence to prove the point that the transfer is a fit and proper one. The evidence is perhaps a little wanting upon that point; but in my opinion there is enough. If I thought there was not I should allow any additional formal evidence to be given, because I am satisfied that when the directors of these two companies had considered what their relative positions were, they did, and no one suggests they did not, consider what was fair and proper for the benefit of both companies.

Then there is this further to be said upon this point. The 14th section of the Act of 1870, as I have already pointed out, does not in my opinion make it incumbent upon the company

(1) 1 Ch. D. 307.

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which wishes to effect a transfer or to take a transfer to prove everything formally to the Court, and satisfy the Court on its own behalf that everything is right, under the penalty of having the application refused unless they discharge that burden. In my opinion that section throws the burden of shewing that the Court ought not to be satisfied upon the persons who complain of what the two companies by their directors have done, and which, as far as the *Argus* is concerned, has been approved of by all the shareholders; and, what is more, by every policy-holder excepting Mr. *Pedley*.

Under these circumstances the arrangement is one to which I think the sanction of the Court ought to be given confirming the arrangement upon which the companies have resolved.

Solicitors: *S. W. Johnson & Son; Oliver & Sons; Pedley & Bartlett; Dawes & Sons.*

D. P.

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Company—Reduction of Capital—Confirmation by Court—Discretion of Court—Preference Shares—Form of Minute to be registered—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 11 [*Revised Ed. Statutes, vol. xv. p.* 625]—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26) [*Revised Ed. Statutes. vol. xviii. p.* 367].

Upon a reduction of the capital of a company under the *Companies Acts*, 1867 and 1877, it is not essential that the reduction should be made equally, or rateably, on all the shares, although, *primâ facie*, in the absence of any agreement to the contrary, the reduction ought to be made in that way.

But a contract made on the issue of any particular class of shares, such as preference shares, that that class of shares shall not be liable to reduction, will be valid.

Whether, however, a company can by contract deprive itself altogether of the power of reducing its capital which is conferred by the Acts, *quære*.

The fact that, at the time when a class of preference shares was created, the articles of association of the company did not authorize any reduction of the capital, will not prevent the reduction of the amount of the preference shares, if a special resolution is previously passed altering the articles by the insertion of a power of reduction.

Under sect. 11 of the *Companies Act*, 1867, the Court has a judicial discretion as to confirming resolutions for the reduction of the capital of a

company, but the confirmation ought not to be refused unless there is something unjust or inequitable in the proposed reduction.

The minute to be registered on the confirmation by the Court of resolutions for the reduction of the capital of a company ought to shew, not only the amount of the capital as reduced, but also the amount at which it stood prior to the reduction.

The articles of association of a company, formed in 1864, under the *Companies Act*, 1862, provided that the directors might, from time to time, with the sanction of a special resolution previously given, increase the capital by the issue of new shares, and that any capital thus raised should be considered as part of the original capital, and should be subject to the same provisions as if it had been part of the original capital, except that it should be lawful for the company by special resolution to direct that the new shares should have such priority in respect of dividends as it should deem expedient. The articles did not contain any power to reduce the capital. In 1872 it was resolved to issue certain preference shares, "bearing interest at 8 per cent. per annum in perpetuity." In 1876 it was resolved to issue certain other preference shares, "entitling the holders to a fixed dividend at 6 per cent. per annum on the amount for the time being paid up in respect of such shares." In both cases it was provided that the preference shareholders should be entitled to attend the general meetings of the company, but that they should not be entitled in virtue of those shares to vote. Both classes of preference shares were issued and were paid up in full, as were also the ordinary shares. In 1885 a special resolution was passed, adding to the articles of association a clause, authorizing the directors from time to time, with the sanction of a special resolution, to reduce the capital by cancelling lost capital, or capital unrepresented by available assets. In April, 1888, special resolutions were passed for the reduction of the whole of the capital (including the preference shares) by one-fourth, on the ground that capital to that extent had been lost. A petition by the company for the confirmation of the resolutions by the Court was opposed by some of the preference shareholders, who contended that there was no power to reduce the amount of the preference shares, or that at any rate the amount of the dividend payable on those shares could not be reduced:—

Held, that there was nothing in the bargain with the preference shareholders which prevented the reduction of their shares, and that there was nothing unfair or inequitable in the proposed reduction.

The resolutions were accordingly confirmed.

PETITION by the company for the confirmation by the Court of a special resolution for the reduction of the company's capital.

The company was formed in March, 1864, by registration under the *Companies Act*, 1862. The memorandum of association provided that the capital should be £150,000, divided into 1500 shares of £100 each.

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The articles of association provided, by clause 41, that "the directors may, from time to time, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares." By clause 42, "All new shares shall be offered to the members in proportion to the existing shares held by them." Clause 43. "Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, the forfeiture of shares on non-payment of calls or otherwise, as if it had been part of the original capital, except that it shall be lawful for the company in general meeting, by special resolution as aforesaid, to direct that the new shares shall have such priority in respect of dividends as it shall deem expedient." The articles did not contain any power to reduce the capital.

In November and December, 1865, the company passed special resolutions providing that the capital should be increased to the sum of £1,000,000, to be divided into 10,000 shares of £100 each, by creating 8500 new shares of £100 each.

In November and December, 1872, special resolutions were passed providing (1) that the company should agree to purchase from the *Barrow Rolling Mills Company* two furnaces erected by, and other property belonging to, that company. (2.) "The consideration for the purchase shall be the sum of £37,700 in preference shares of this company, bearing interest at 8 per cent. per annum from the 1st of January last, such preference shares to be issued to the present shareholders in the *Rolling Mills Company* in proportion to their holdings." (3.) "The directors are authorized to issue preference shares to the amount of £37,700, bearing interest at 8 per cent. per annum in perpetuity, for the purpose of carrying out the above arrangement." (4.) "The holders of the above mentioned preference shares shall be entitled to attend the general meetings of the company, but they shall not be entitled in virtue of such shares to vote, or to interfere in any way in the company's proceedings, nor shall they, in virtue of such shares, be eligible as directors of the company." These preference shares were issued accordingly.

In December, 1873, special resolutions were passed to increase

the ordinary capital of the company to £1,500,000, by the creation of 5000 new shares of £100 each.

In March and April, 1876, special resolutions were passed as follows:—

(1.) "The capital of the company shall be, and is hereby increased, by the addition thereto of 50,000 preference shares of £10 each, entitling the holders to a fixed dividend of 6 per cent. per annum on the amount for the time being paid up in respect of such shares."

(3.) "The holders of the said new preference shares shall be entitled to a dividend thereon only after payment of the interest from time to time payable in respect of the mortgage and bond or debenture debts of the company, and after payment of a dividend at the rate of 8 per cent. per annum on the preference shares of the company, amounting to £37,700, created in 1872; and in case in any year the net profits of the company shall not be sufficient for the payment in full of the dividends on such new preference shares, the net profits of any subsequent year shall (after payment thereout of interest on the mortgage, bond, or debenture debts of the company and of dividends on the said 8 per cent. preference shares) be applied in payment to the holders of the said new preference shares of the amount by which the dividends of any previous year or years may have fallen short of the fixed rate of 6 per cent."

(5.) "The holders of the said new preference shares shall be entitled to attend the general meetings of the company, but they shall not be entitled, in virtue of such shares, to vote or to interfere in any way in the company's proceedings, nor shall they, in virtue of such shares, be eligible as directors of the company."

The whole of these preference shares were accordingly issued.

In December, 1881, the company passed a special resolution that "the company may modify the conditions contained in their memorandum of association by inserting in their articles a power to subdivide their ordinary share capital into shares of a smaller amount than is fixed by their memorandum of association."

In January, 1882, a special resolution was passed that "the

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ordinary share capital of the company shall be divided into 150,000 shares of £10 each, in lieu of 15,000 shares of £100 each."

In March and April, 1885, a special resolution was passed "that the following addition be made to the articles of association of the company:—

"The directors may, from time to time, with the sanction of a special resolution of the company, reduce the capital of the company by cancelling lost capital, or capital unrepresented by available assets, or by paying off any capital which may be in excess of the wants of the company, or by cancelling shares, which, at the date of passing such resolution, have not been taken or agreed to be taken by any person, or by any other lawful means, and either with or without extinguishing or diminishing the liability remaining on the shares of the company."

In March and April, 1888, the following special resolution was passed:—

"That the share capital of the company be reduced from £2,037,700, divided into 150,000 ordinary shares of £10 each, 377 £8 per cent. preference shares of £100 each, and 50,000 £6 per cent. preference shares of £10 each, to £1,528,275, divided into 150,000 shares of £7 10*s.* each, 377 £8 per cent. preference shares of £75 each, and 50,000 £6 per cent. preference shares of £7 10*s.* each; and that such reduction be effected by cancelling capital which has been lost, or is unrepresented by available assets, to the extent of £2 10*s.* per share upon each of the 150,000 ordinary shares, £25 per share upon each of the 377 £8 per cent. preference shares, and £2 10*s.* per share upon each of the 50,000 £6 per cent. preference shares of the company which have been issued and are now outstanding, and by reducing the nominal amount of all the said ordinary shares from £10 to £7 10*s.* each, and of all the said 8 per cent. preference shares from £100 to £75 each, and of all the said 6 per cent. preference shares from £10 to £7 10*s.* each."

The petition asked the Court to confirm this resolution.

The proposed reduction was objected to by *E. H. Carbutt*, who was a holder of 400 of the 6 per cent. preference shares. He was also acting as chairman of a committee of preference shareholders

opposed to the reduction. The committee represented the holders of 114 of the 8 per cent. preference shares, and 3400 of the 6 per cent. preference shares.

In an affidavit made by *Carbutt* he stated that the grounds of objection to the proposed reduction of capital were as follows :—

"(1.) That both classes of preference shares were created as separate and independent classes of shares, quite distinct from the ordinary capital of the company and subject to different rights and incidents.

"(2.) As regards the 8 per cent. shares, they were created and issued for the specific purpose of purchasing property which has proved to be of great value to the company, and the reduction of these shares amounts in effect to an alteration of the terms of the purchase at the instance of the purchasers.

"(3.) The grounds for the present reduction of capital are all matters which could have been foreseen and provided against by reasonable and prudent administration of the company during the period while the ordinary shareholders were in receipt of dividends.

"(4.) The ordinary shares have been in previous years written up out of the assumed profits of the undertaking, to an amount equal to the amount of the present reduction; if this had not been done, there would now be no necessity for the reduction of capital.

"(5.) Some of the proposed reductions are unnecessary, and made contrary to the practice universally prevailing amongst companies with similar property and objects throughout the country.

"(6.) There is no corresponding revaluation of such portions of the property of the company as have increased in value."

The item of reduction principally objected to related to some collieries in Yorkshire of which the company were lessees. The evidence shewed that, up to the 31st of December, 1887, the company had expended upon these collieries the sum of £370,460, and that their full present value was only £150,000. It was proposed to write off £220,460 for this depreciation in value, and this formed part of the lost capital in respect of which the proposed reduction was to be made.

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No dividend had been paid on the ordinary shares of the company since the year 1882, and for some time the dividends on the preference shares had not been paid in full.

Sir *H. Davey*, Q.C., and *Farwell*, for the company :—

The proposed reduction of the capital ought to be confirmed.

If capital has really been lost, the Act of 1877 applies. It is not suggested that dividends have in any sense been paid out of capital, and the fact that the ordinary shareholders received large dividends at a time when they were really earned is immaterial.

The only questions which have to be considered are ; (1) whether the capital which it is proposed to write off is really "lost or unrepresented by available assets ;" (2) whether, having regard to the interests of all parties, the resolutions can properly be confirmed by the Court. The directors have acted fairly in considering what loss ought to be attributed to capital, and no good reason has been shewn for disturbing their judgment.

But it is said that there is no power to reduce the capital of the preference shareholders against their will—that the reduction is *ultrà vires* so far as regards them. It is said that their capital is distinct from the ordinary capital, that it has different rights, and is subject to different liabilities, and that they are expressly excluded by their contract from the right of voting at meetings of the company. But clause 43 of the articles provides that the preference capital is to be considered as part of the original capital of the company, and is to be subject to the same provisions, the only difference being the priority in respect of dividends. In *Bannatyne* v. *Direct Spanish Telegraph Company* (1) it was held by the Court of Appeal that preference capital could be reduced, and that case governs the present. The Act does not give any power to reduce the capital of a company otherwise than equally or rateably all round. Both classes of preference shares were created after the Act of 1867 was passed ; the preference shareholders, therefore, entered into a company which had power to reduce its capital, if a clause should be introduced into the articles authorizing them to do so.

(1) 34 Ch. D. 287.

Sect. 9 of that Act conferred a general power of reduction, and this power was expressly extended by the Act of 1877 to paid-up capital, because of the decision of Sir *G. Jessel*, M.R., in *In re Ebbw Vale Steel, Iron, and Coal Company* (1). Both Acts treat the capital of the company as a whole. The preference shareholders have no preference except as to dividends; in the distribution of assets in a winding-up they would have no priority. It can make no difference that the power to reduce capital was inserted in the articles after the creation of the preference shares; the preference shareholders took their shares subject to the general law: *Bannatyne* v. *Direct Spanish Telegraph Company* (2). There is nothing amounting to an agreement with the preference shareholders that their shares shall not be reduced, and the company could not have intended to deprive themselves of the power of ever reducing their capital, even if they could do so.

The Court has no power to reduce the capital of a company; it can only confirm the special resolution of the shareholders. It has a discretion, but it will not "impose conditions which would amount to an alteration of the scheme": *In re Direct Spanish Telegraph Company* (3). The fact that a large majority of the preference shareholders support the proposed reduction shews that the scheme cannot be unfair or unjust to those shareholders.

Rigby, Q.C., and *Chadwyck-Healey*, for the opposing preference shareholders:—

We admit that the directors have acted in perfect good faith, and that they have no unfair intention. They have shewn their desire to have the matter fully discussed by raising no objection to our appearing.

[North, J.:—My present impression is that you have a *locus standi*.]

The present case is an entirely different one from *Bannatyne* v. *Direct Spanish Telegraph Company*. Here the ordinary shares have to a great extent been paid up by means of bonuses

(1) 4 Ch. D. 827.
(2) 34 Ch. D. 287.
(3) 34 Ch. D. 307, 312.

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out of profits, and for some years nothing was written off for depreciation of assets. The effect of the proposed reduction will be to make the preference shareholders contribute to the depreciation, while the ordinary shareholders have had all the benefit of the company's prosperity, and the preference shareholders had no voice in the matter. It would be possible entirely to extinguish the preference capital in this way. In *Bannatyne's Case* (1) a catastrophe had happened in the destruction of a cable belonging to the company. Moreover, in that case, when the preference shares were issued the articles of the company contained a power to reduce the capital. It was, therefore, part of the bargain (not merely by virtue of the Act) that the preference shares might be reduced. It is no part of the duty of a company to reduce its capital, and it may enter into a valid bargain that a particular class of capital shall not be liable to reduction. In each case the Court must have regard to the actual bargain, and the decision in *Bannatyne's Case* amounts to no more than that. In that case it was held that the preference shareholders had bargained that their capital should be reducible. In the absence of fraud, there is nothing in the Act to prevent the reduction being limited to part only of the capital. Why should not the ordinary shareholders vote for the reduction of their own capital, though it might be fraudulent for them to vote for the reduction of the capital of the preference shareholders? The Court has an unlimited discretion as to confirming the reduction. The fact that the preference shareholders have no voting power throws great light on the real nature of the bargain with them. In the absence of an express bargain with the preference shareholders, as in *Bannatyne's Case*, it would not be equitable that all the capital should be equally reduced, unless every part of was similarly situated. The Court in confirming the resolutions can impose terms. The resolutions which created the 8 per cent. preference shares give them a right to interest at 8 per cent. in perpetuity upon their original amount, and, in the case of the 6 per cent. preference shares, the resolutions expressly provide that they are to be entitled to the fixed dividend "on the amount for the time being paid up in respect of the shares." Every-

(1) 34 Ch. D. 287.

thing points to this, that the preference shares are distinct from the ordinary capital of the company, though, under clause 43 of the articles, they might have been issued as part of the ordinary capital, if the company had chosen so to issue them.

Sir *H. Davey*, in reply :—

The objections are that the proposed reduction is *ultrà vires* as regards the preference shares, and that, if it is *intrà vires*, it would not be just to the preference shareholders.

I say that the reduction is within the power given by the Act, and that *Bannatyne's Case* (1) applies. In the absence of an express power in the articles, the company cannot reduce one part of their capital without reducing the whole; they cannot alter the rights of the shareholders *inter se*. They cannot go beyond the statutory power : *Griffith* v. *Paget* (2) ; *Hutton* v. *Scarborough Cliff Hotel Company* (3). In the latter case it was held that, in the absence of express power, the company could not issue preference capital. In *Harrison* v. *Mexican Railway Company* (4) it was held that preference shares could be issued when the articles of association of the company gave power to do so, though the memorandum of association did not. In the present case neither the memorandum nor the articles give power to create any priority except as to dividends; there is no power to alter the mode in which loss is to be shared. The preference shares could only be created by virtue of clause 43 of the articles. The preference capital is part of the original capital, and is subject to the same incidents, except so far as the resolutions which created it give a priority, and they give priority only as to dividends. It would have been *ultrà vires* to attempt to give the preference shareholders a preference in the distribution of a loss of capital: *Bannatyne* v. *Direct Spanish Telegraph Company* (5). If the articles had given power to create preference shares with a preference in the distribution of capital, and this power had been acted on, it may be that the preference shares could not be reduced. But that is not the present case; the bargain is an entirely different one. If it

(1) 34 Ch. D. 287.
(2) 5 Ch. D. 894; 6 Ch. D. 511.
(3) 4 D. J. & S. 672.
(4) Law Rep. 19 Eq. 358.
(5) 34 Ch. D. 287, 299.

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is not *ultrà vires* to reduce the preference shares, they must be reduced *pari passu* with the others.

Is there anything which makes it *ultrà vires* to reduce the preference shares? It is said that the agreements with the preference shareholders prevent the reduction, and that, at the time when the shares were issued, there was no power of reduction contained in the articles, as there was in *Bannatyne's Case* (1). It is said that, in the case of the 8 per cent. shares, the contract is to pay a perpetual annuity. It is really only a contract to pay a preferential dividend. As to the 6 per cent. shares, the words "on the amount for the time being paid up in respect of such shares," merely mean that the dividend is not to be paid on the nominal amount of the shares, but only on the amount actually paid up in respect of them. Those words were inserted for the benefit of the company, and not with the view of preventing a reduction of the preference capital. The object of the Act of 1877 is to enable a company to write off lost capital, and the preference dividend will after the reduction still be upon the amount paid up in respect of the shares, *i.e.*, on the amount which is to be taken as paid up after the reduction has been made.

There is no sound distinction between the present case and *Bannatyne's Case*; the resolutions by which the preference shares were created are in substance the same in both cases (*vide* judgment of Lord Justice *Cotton* (2)). The preference shareholders must be taken to have entered into their contract with the knowledge that the company could under the Act acquire a power to reduce their capital. In *Bannatyne's Case* the company had only to pass special resolutions to reduce the capital; in the present case, they had also to take the prior step of altering their articles. There is no distinction in principle. The statutory power to reduce capital can be excluded, if at all, only by express contract. But it has been doubted by some Judges whether a company can ever divest itself of its statutory powers. The fact that the preference shareholders have no right to vote makes no difference; they contracted that they would be bound by any resolution of the ordinary shareholders duly passed.

With regard to the exercise of the discretion of the Court, the

(1) 34 Ch. D. 287. (2) 34 Ch. D. 300, 301.

fact that so small a number of the preference shareholders dissent is very material.

1888. Aug. 9. NORTH, J. (after stating the provisions of the articles of association and the various resolutions as above set forth) continued :—

The proposal is to write off one-fourth of the capital. The reduction is made up of six different heads, all of which are fully explained in the report of the directors made in the course of the present year for the year 1887. The propriety of the reduction is not disputed, except as regards the proposed reduction of the value in the accounts of the company of the *Yorkshire* collieries from £370,460 to £150,000, by writing off £220,460. The only suggestion made impugning the reduction under that head is, that it is not fair to take a time at which the property is very much depressed, and to reduce the capital upon that footing. But, in arriving at those figures, the present value cannot be estimated without taking into consideration every legitimate matter arising out of a mere temporary depression, as distinguished from a permanent depression, and it is not disputed by the person who opposes the confirmation of the resolution that everything has been done by the directors in perfect good faith, and done in the ordinary, proper, and regular administration of the affairs of the company.

There is only one shareholder who opposes the resolution —Mr. *Carbutt*—who holds 400 of the second preference shares, representing a capital of £4000. He is also chairman of a committee which represents other persons who object, and they are the holders of 114 first preference shares, representing £11,400, and the holders of 3400 second preference shares, including his own holding, representing a capital of £34,000. In other words, it is a capital of £45,000 as against a capital of over £2,000,000.

The grounds upon which he objects are several. The objection as regards the 8 per cent. shares is that "they were created and issued for the specific purpose of purchasing property which has proved to be of great value to the company, and the reduction of these shares amounts in effect to the alteration of the terms of the purchase at the instance of the purchasers."

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Now what happened was this. The property was purchased for a given number of shares, and that number was no doubt calculated with reference to the value of those shares. It may be, perhaps, that rather more was given by reason of the purchase-money being taken in shares instead of cash, though I do not know how that was. But the persons who agreed to accept the purchase-money in shares entered into that agreement for good or for bad. It might be, and it would be, if the shares increased in value, a very advantageous thing. If, on the other hand, the shares diminished in value, they would be worse off than if they had received cash, but they elected to take the chance for better or for worse, and were content to take the shares as the purchase-money, and it seems to me that they stand in exactly the same position as if they had received the amount in cash and had immediately reinvested it in shares of the company.

The first point of importance which I have to consider is, what is the effect of the power given by the Act to make the reduction, and, in my opinion, there is nothing in the Act which requires that the reduction should be spread, either equally or rateably, over all the shares in the company. The Act provides for the reduction of the capital, and the capital of the company may be reduced, for instance, by one-fourth, either by reducing the shares all round by one-fourth, or by reducing half of them by half, and the other half not at all. The Act itself, in my opinion, does not touch that point. The reduction, so far as the Act goes, may be applied to part of the shares only, and not to the whole. The reason for the reduction in the present case is that a loss has been sustained. The rule to be adopted in applying the reduction to the shares is, that the reduction must be borne by those shares upon which the loss sustained ought to fall. If, by contract among the shareholders, some of the shares are primarily liable to bear the loss to the relief of others, those are the shares upon which the reduction should be made. If, on the other hand, all the shares ought to bear the loss, the reduction ought to be applied to them all, either equally, according to the figures, or rateably, if the shares happen to be of different amounts, and, in my opinion, the law is clear, that the reduction to be made must be *primâ facie* equal, according to

the position of the parties, and *primâ facie* it must be made on all the shares of the company, unless there is some express provision to the contrary. This was very clearly stated by Lord Justice *Cotton* in *Guinness* v. *Land Corporation of Ireland* (1), where he, after quoting from a previous decision of Sir *G. Jessel*, M.R., said: "But in reality it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividends arises, but by the implication which the law raises as between partners, unless their contract has provided the contrary." Again, in *In re South Durham Brewery Company* (2), Lord Justice *Lindley*, in giving judgment, referred (3) to the observations of Lord *Westbury*, in *Hutton* v. *Scarborough Cliff Hotel Company* (4), and then said: "But they are, I think, properly explained by Lord Justice *Cotton* in *Guinness* v. *Land Corporation of Ireland*, where he says that the equality of the shareholders as regards dividends arises, not by implication from the construction of the memorandum, but by the implication which the law raises as between partners, unless their contract has provided the contrary." Then in *Bannatyne* v. *Direct Spanish Telegraph Company* (5), Lord Justice *Cotton* said (6): "The Act of 1867 gives in general terms power to reduce capital, and the articles of association in this case provide that the preference shares when formed shall be part of the capital. If there was a winding-up, the capital being partly lost, the preference shareholders and the ordinary shareholders must bear the loss rateably between them, because these shares were constituted without any preference as regards capital, though they had a preference as regards dividend. Then, if that is so, and there is a loss of capital, in consequence of which there is a reduction made in the capital of the company by reducing the nominal amount of the shares, that must be borne, not only by the ordinary shareholders, but also by the preference shareholders."

Then, that being the general law, the question arises, what is the contract between the parties in the present case? That

(1) 22 Ch. D. 349, 377.
(2) 31 Ch. D. 261.
(3) Ibid. 270.
(4) 4 D. J. & S. 672.
(5) 34 Ch. D. 287.
(6) Ibid. 299.

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contract is contained, in my opinion, in clauses 41 to 43 of the articles, clause 43 being the most material. It is there said that "any capital raised by the creation of new shares shall be considered as part of the original capital, and subject to the same provisions as if it had been part of the original capital, except that it shall be lawful for the company in general meeting, by special resolution, to direct that the new shares shall have such priority in respect of dividends, as it shall seem expedient." There is an express power given to create priority in respect of dividends, but no power is given to create priority in respect of capital. In my opinion, the company had no power to do what it is said they ought to have done here, namely, to throw the reduction upon the shares other than the preference shares, to the relief of the preference shares.

The argument in opposition to the petition was founded upon two things. First, it was said that in this case there was no power to reduce the preference shares; and next, that, if there was such a power, it was a case in which, under sect. 11 of the Act, the Court, having a discretion in the matter, ought to decline to sanction the reduction. Sect. 11 says that the Court "may make an order confirming the reduction on such terms and subject to such conditions as it deems fit." To deal first with the question whether there is power to reduce the preference shares or not, there is a preliminary matter which is not unimportant. It has been doubted, and may still be doubtful, whether a company can contract itself out of the power to reduce its capital which is conferred upon it by the Act and the articles. In *Walker* v. *London Tramways Company* (1) Sir *G. Jessel*, M.R., held that a company could not contract itself out of sect. 50 of the *Companies Act*, 1862. But in the present case the law seems to me to be laid down, ready to hand, in *Bannatyne* v. *Direct Spanish Telegraph Company* (2). That is a decision of the Court of Appeal which goes to the root of the matter, and must govern the present case, unless there are any reasons which make that case distinguishable from the present. The first distinction which is suggested is this, that in that case the percentage payable to the shareholders was payable upon reducible shares, that is to say, when

(1) 12 Ch. D. 705. (2) 34 Ch. D. 287.

the preference shares were issued it was already part of the constitution of the company as contained in the articles that the shares might be reduced, and, therefore, if a man contracted to take shares, he took them with the knowledge that at that time, as the regulations of the company stood, they were capable of reduction, and it is said that the present case is different, because at the times at which both sets of preference shares were issued the company had no power to reduce the capital. It is quite true that at that time no such power was contained in the articles, and, until the articles were amended, the reduction could not have taken place. But power had already been given by the Act to the company to reduce its capital, if the articles provided for it, and, therefore, in my opinion, the persons who took the preference shares agreed to take shares in a company which, by the Act, were reducible, if the company in general meeting should pass special resolutions authorizing a reduction, and should amend their articles accordingly.

The judgments of all the Lords Justices in *Bannatyne's Case* (1) were relied upon, because the judgment of each learned Judge contained passages referring to the fact that, at the time at which the preference shares in that case were created, the articles did contain a power to reduce the capital. But I do not find that any of the Lords Justices based his judgment precisely upon that ground, or suggested that the law would have been otherwise if the articles had not contained such a power, and Lord Justice *Cotton* certainly used language which is inconsistent with that view. He said (2): "In my opinion they" (*i.e.* the preference shareholders) "ought also to be considered as knowing and taking into consideration the provisions of the Act of 1867, which provided that a company limited by shares might by special resolution so far modify the conditions contained in their memorandum of association, if authorized so to do by its regulations, as originally framed or as altered by special resolution, as to reduce its capital. That is in general terms, which would apply not only to original non-preferential capital, but to any preferential capital." There is another case which seems to me a strong authority upon the subject, I mean *Doman's Case* (3),

(1) 34 Ch. D. 287. (2) 34 Ch. D. 301. (3) 3 Ch. D. 21.

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the decision being that of Lord *Cairns* and Lords Justices *James* and *Baggallay*. There the question was, what was the effect of an alteration of the deed of settlement of an insurance company upon the position of policy-holders who had taken out their policies before the laws and regulations of the company were altered so as to give power to amalgamate with another company. In the course of the argument it was said by the counsel for the liquidator (1): "Then the amalgamation is void as *ultrà vires*. By the original deed there was no power to amalgamate, and the only power is that alleged to be created by laws and regulations made in 1848. But laws and regulations cannot extend to destroy the company, and at all events cannot prevail against policy-holders whose policies are earlier than the laws and regulations. After a policy or an annuity was granted the company could not make any new laws which affected it." During the argument Lord *Cairns* said: "In many cases a company which had originally no power to dissolve or amalgamate has held meetings and acquired that power. A policy-holder cannot upset such proceedings if they were taken in good faith." Then, in the course of his judgment, after deciding the case upon another point, he said (2): "I have assumed in what I have said that the transaction of amalgamation was *ultrà vires*, and perhaps it is not necessary to do more than assume that; but I doubt very much whether it was *ultrà vires*. I am inclined to agree with what appears to have been the impression of Lord *Westbury*, that it was *intrà vires*. It is, no doubt, a very strong thing, after policies have been effected with a company, that that company should obtain power to transfer its business and assets to another company. But, at the same time, if policy-holders will enter into dealings with a company whose contracts may be said to be subject to the provisions of the deed of settlement of the company, and if the deed of settlement of the company, in the most general terms, authorizes a number of general meetings to make alterations in the constitution of the company, and new laws and regulations for the company, then so long as those laws and regulations are made in good faith—because the cases which have been suggested, such as absolving of the company from all

(1) 3 Ch. D. 23. (2) 3 Ch. D. 26.

liability, would not be in good faith—I doubt very much whether the policy-holders, entering into the contracts they have entered into, are not bound by the alterations and by the new laws and regulations." And Lord Justice *James* and Lord Justice *Baggallay* concurred in that view. It may, no doubt, be said that that expression of opinion was not necessary for the decision of the case, but, when the point was raised and argued and dealt with in the judgment, and by Judges of such eminence—and when their view is fortified by the opinion of Lord *Westbury* in a a case which, though it is not binding on me, still shews what his opinion was—it seems to me a very strong confirmation of my own view, that the fact that the power to reduce capital was only introduced into the articles after the shares had been issued does not make any distinction between the present case and *Bannatyne's Case* (1). If the law was such as to a policy-holder, who is not a member of the company, *à fortiori* it must apply to a person who by his contract has become a member of the company, subject to its existing laws and regulations, and to any substituted laws and regulations which may be made from time to time in the manner required by the constitution of the company of which he is a member.

Then another distinction is suggested between *Bannatyne's Case* and the present case. It is said that there the terms of the contract were different from those of the contract in the present case, and, of course, if that were so, that case might possibly not be an authority. In *Bannatyne's Case* the memorandum was like the present memorandum ; and the nominal capital was divided into £10 shares. Then the articles provided that the directors might, with the previous sanction of a special resolution of the company, increase its capital by the issue of new shares, to such an amount, with such preferential rights to dividend, and such priority in the distribution of assets, or subject to such postponement of dividends or in the distribution of assets, as should in such special resolution be provided. Then it was also provided that "All capital raised by the creation of new shares shall be considered as part of the original capital, and

(1) 34 Ch. D. 287.

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shall be subject to the same provisions in all respects as if it had been part of the original capital, except so far as these articles or the resolutions authorizing the raising thereof may otherwise direct." Then the resolution actually passed, constituting the contract under which the shares were taken, was this: "That such new shares shall be entitled to a fixed preferential dividend of £10 per cent. per annum." Lord Justice *Cotton* (1) put this construction on that contract. He said: "It was practically not contended, and in my opinion it could not be successfully contended, that the second resolution, providing that there shall be an issue of new shares of £10 each, contained any contract which would be broken by applying under the Act to reduce the shares, ordinary and preferential, from £10 shares to £5 shares. Is there any contract in the third resolution as to dividend which prevents this being done, so as to reduce the dividend which will be paid to the preference shareholders to 10 per cent. on what will then be the amount of their shares? 'Such new shares shall be entitled to a fixed preferential dividend of 10 per cent. per annum.' It is very true that 10 per cent. on what was actually paid on the shares was £1 per share, but in my opinion the bargain was not for £1 per share, so as to make an annuity of £6000 in respect of the whole of the preference shares, but for £10 per cent. on the amount of the shares, and if by any means the amount of the shares is reduced from £10 to £5—which will be the result if these resolutions for the reduction of capital are carried into effect—then the bargain, in my opinion, will be performed by giving the holders of those preference shares 10 per cent. on the then amount of their capital in the company." Then Lord Justice *Fry* said (2): "The right is a right to a fixed preferential dividend of 10 per cent. per annum. But on what? Obviously, it seems to me, on the amount of the shares, those shares being, as I have already stated, according to my view of the true construction of the instruments, subject to the power of reduction." Therefore, it was held to be 10 per cent. on the amount of the shares, those shares being subject to reduction; that was the meaning of the resolution passed in that case. Now,

(1) 34 Ch. D. 301. (2) 34 Ch. D. 305.

in the present case, to take the first preference shares, the resolution is, "That the directors are authorized to issue preference shares to the amount of £37,700, bearing interest at 8 per cent. per annum in perpetuity." Eight per cent. on what? Eight per cent. on the amount of the shares. That seems to me the natural meaning of the words, independently of the construction which has been put upon words which I cannot distinguish from those words in *Bannatyne's Case* (1), which decided that the meaning was that the dividend was to be paid on the amount of the shares subject to reduction, and, in my opinion, the meaning of the resolution which I have to construe is the same.

The resolution under which the second preference shares were issued was somewhat different in its terms. There was to be an issue of 50,000 preference shares of £10 each, entitling the holders to a fixed dividend at the rate of 6 per cent. per annum "on the amount for the time being paid up in respect of such shares." The argument upon that is this: these second preference shares have £10 per share paid up, therefore they are to have a dividend of 6 per cent. upon the £10 which is paid up, notwithstanding that the amount of the shares is reduced to less than £10. In my opinion that is not the meaning of the resolution. The 6 per cent. might have been made payable, either upon the nominal amount of the shares, or upon the amount for the time being actually paid up upon them, and it is for the purpose of limiting it to the latter amount that the resolution was expressed in these terms, and, in my opinion, the meaning is that the holders are to be entitled to a fixed dividend, at the rate of 6 per cent. per annum, upon such an amount less than the nominal amount as is for the time being paid up upon the shares, and upon the nominal amount when they are fully paid up, that is, when the amount paid up and the nominal amount are the same. The object of introducing the words "the amount for the time being actually paid up" was, to prevent the payment of a dividend on the margin between the amount actually paid up on a share and the full amount which might be called up. These two resolutions, therefore, do not, in my opinion, differ in any

(1) 34 Ch. D. 287.

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material respect from the resolution passed in *Bannatyne's Case* (1), and the decision in that case is, in my view, one which I ought to follow now.

Then it was said that, even if there is power to make the proposed reduction, still the Court ought not, in its discretion, to give the sanction which is necessary in order that the resolution may be effectual. That a certain amount of discretion is given to the Court by sect. 11 is, I think, clear from the words, but I do not find that any authority has laid down very plainly in what way that discretion is to be exercised. In my opinion the section does not give the Judge any right to form his own opinion, and to say what ought to be done, independently of matters which ought to guide him judicially. Then what is to be the judicial guide in such a case? I think the Judge is bound to see that no injustice is done to the shareholders, and that the proposed reduction is fair. If, for instance, I found that an attempt was being made to reduce all the shares alike, when, by reason of some contract, the preference shares ought not to be reduced at all, it is clear that under such circumstances I should have a right to refuse to sanction the resolution. But, in the absence of anything unfair and inequitable, I do not think that I have any discretion to exercise. In *In re Direct Spanish Telegraph Company* (2) Mr. Justice *Kay*, upon an application to sanction the proposed reduction, said (3): "Upon consideration, I do not think that the proposed reduction in this case will be unjust as between the shareholders." That seems to me to be the thing which I must take into consideration in determining whether I shall sanction this proposed reduction. It was said that it would be unjust that the preference shareholders, who cannot share in any increase of profit, if the company is very successful, should have to share in the loss in case it is not successful. But I do not think the Act makes any such distinction, and the non-sharing in profits and the sharing in loss are in principle exactly alike. The preference shareholders bargained that they would not share in increased profits, and the corresponding

(1) 34 Ch. D. 287. (2) 34 Ch. D. 307.
(3) 34 Ch. D. 312.

bargain is that they shall not receive less in case the profits of the company diminish. If the profits diminish they will still receive their 8 per cent. or 6 per cent., as the case may be, even if there is not enough to pay a penny to the ordinary shareholders, and, if there is not enough in any one year to pay the preference shareholders in full, the profits of subsequent years are to be devoted towards doing so, before the ordinary shareholders can receive anything. Therefore, I do not think there is anything unfair in what is proposed.

Again, it is said to be unfair that the preference shareholders should be affected by the passing of resolutions by the votes of ordinary members of the company, the preference shareholders themselves being excluded by contract from any power of voting. I think the answer is, that it is by contract that they are excluded —it is part of the bargain with them. They were content to take their shares subject to the regulations of the company, although they knew that those regulations might be altered by the votes of persons whose votes they could not influence—at any rate directly—by taking part in the voting themselves. I do not, therefore, see that what is proposed is in any way inequitable or unjust, and my view is confirmed by this fact, that a very large majority of the preference shareholders themselves are of the same opinion. As regards the first preference shareholders, of whom Mr. *Carbutt* is not one, the opponents are one third of the whole. As regards the second preference shareholders, the opponents represent only £34,000 out of £500,000, and, although many do not take any part in the matter, yet it appears that out of the £500,000, £350,000 in round numbers are in favour of the reduction. The resolution of the shareholders does not in any way bind me, but I am glad to find that the view which I have arrived at upon independent grounds is so strongly confirmed by the action of the shareholders themselves.

Under these circumstances I have come to the conclusion that no ground has been shewn for the opposition, and, therefore, I must sanction the proposed reduction.

I should add that the form of minute suggested in the petition is not quite right. It ought, in accordance with the form which is, I think, now always adopted, to shew, not only what the amount

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of the capital as reduced will be, but also the amount from which it is reduced.

Farwell:—The petition asks that the use of the words "and reduced" as part of the name of the company may be dispensed with altogether. What will your Lordship do about that?

NORTH, J.:—I think those words must be used for a month.

Solicitors for Company: *Currey, Holland & Currey.*
Solicitors for Opposing Shareholders: *Beale & Co.*

W. L. C.

LOUND *v.* GRIMWADE.

STIRLING, J.

1888

Feb. 28, 29; *March* 1; *May* 16.

[1886. L. 277.]

Contract—Bond—Consideration partly illegal—Threats of Criminal Proceedings—Contract tending to affect the course of Criminal Proceedings.

A. gave *B.* a bond to secure £3000, the consideration for which was that *A.* should be free from any legal proceedings or other consequences for having introduced *B.* to *X.*, through whom *B.* had lost money; and *A.* also gave *B.* a mortgage as a collateral security for the bond.

A. afterwards brought an action against *B.* to set aside these securities, alleging that he had executed them under duress from threats of criminal proceedings, and that the true consideration for them was an illegal one, *i.e.*, the abandonment of such criminal proceedings. *B.* denied the threat of criminal proceedings, and contended that the consideration was the compromise of a civil liability.

The evidence shewed that the securities were not executed under threats of criminal proceedings or under undue pressure, but that the consideration for them included stipulations that certain criminal proceedings pending against *X.* should be conducted in such a way either that *A.'s* name should not be mentioned, or that if mentioned *A.* should be exonerated from all blame in connection with the transaction:—

Held, that the consideration was partly illegal, as containing stipulations with reference to the conduct of the pending criminal proceedings, by which the course of such proceedings might have been affected; and therefore that the bond and mortgage were obtained without good and sufficient consideration.

THIS was an action by *John Adams Lound* against *William Lott Grimwade*, in order to set aside, as obtained without sufficient consideration and by duress, an indenture of mortgage to secure £3000, dated the 13th of October, 1881, and made between the Plaintiff of the one part and *William Lush Hiscock* of the other part, and also a bond to secure £3000 of even date, and made between the same parties.

Hiscock had since the date of the mortgage and bond become bankrupt, and *Grimwade* was his trustee in bankruptcy.

The bond was in form an ordinary bond in the penal sum of £6000, and was conditioned as follows:

"Now the condition of the above-written bond or obligation is such that if the above-bounden *J. A. Lound*, his heirs, executors,

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or administrators, shall pay unto the said *W. L. Hiscock*, his executors, administrators, or assigns, the sum of £3000 on the 8th day of January next (the consideration for such sum of £3000 being that the said *J. A. Lound* is to be free and clear from any legal proceedings or other consequences for having introduced the said *W. L. Hiscock* to one *Thomas Brough Cameron*, through whom the said *W. L Hiscock* has lost various sums of money), then the above-written bond or obligation shall be void; otherwise the same shall remain in full force and virtue."

The indenture of mortgage recited that *Lound*, the mortgagor, might thereafter upon the death of his father become entitled to certain sums of money, pecuniary legacies, and otherwise, and was desirous of charging such contingent interests with the sums of money necessary for securing payment of the bond hereinafter mentioned, and that the mortgagor was indebted to *Hiscock*, the mortgagee, in £3000, for which he had already given his bond of even date, and for the purpose of collaterally securing the bond had agreed to enter into the present security; and *Lound* thereby covenanted if he survived his father to pay *Hiscock* within six months after his father's death £3000 and interest at 6 per cent., and charged all the interest to which he might become beneficially entitled under his father's will with the payment of that sum and interest.

At the date of these documents *Lound's* father was living, and had not made his will.

On the 17th of August, 1882, *Hiscock* was adjudicated a bankrupt, and in September following the Defendant was appointed trustee in the bankruptcy.

The Plaintiff's father died on the 3rd of October, 1884, having by his will made certain bequests in favour of the Plaintiff. The Plaintiff had, however, heavily incumbered his expectations under the will, and this action was in fact prosecuted on behalf of his incumbrancers.

On the 8th of March, 1886, an order was made by Mr. Justice *Kay* in the following terms: "Whereas the Plaintiff *John Adams Lound* affirms and the Defendant *William Lott Grimwade* denies that the bond and indenture both dated the 13th of October, 1881, in the indorsement of the writ mentioned, were obtained by

the bankrupt *W. L. Hiscock* from the Plaintiff *John Adams Lound* without good and sufficient consideration and by duress, and the Judge, considering it desirable that such issue should be tried by the Judge, It is ordered that the same be tried accordingly by the Judge and be set down among the actions for trial with witnesses."

This issue was now tried by Mr. Justice *Stirling*, and the evidence as to the circumstances under which the bond and mortgage were given was to the following effect:—

The Plaintiff's father was an auctioneer and public-house broker, who formerly carried on business at 60, *Chancery Lane*. The Plaintiff, at the time of the transactions in question in this action, was in practice as a solicitor, his business being mainly derived from his father. About April, 1881, he became acquainted with one *Thomas Brough Cameron*, who then carried on, or professed to carry on, business as a wine merchant; and about, or shortly before, the same time he also made the acquaintance of *William Lush Hiscock*, who had some time previously come into a fortune of about £13,000, and was in possession of considerable sums of money which he was desirous of putting out at high rates of interest. Through the intervention of the Plaintiff, *Cameron* and *Hiscock* became acquainted; and between April and August, 1881, *Hiscock* made a series of advances, to the amount, as he stated of £7,500 in all, to *Cameron*, on the security of brandy warrants. It was asserted by *Hiscock* (but denied by the Plaintiff) that the Plaintiff acted as his solicitor, and advised him that he might safely enter on these transactions, and that he was in fact cognisant of a large proportion of them. About the end of August, 1881, it was discovered by a Mr. *Addison*, an accountant and friend both of the Plaintiff and *Hiscock*, that the spirits on which these advances had been made were, instead of being worth 6*s.* 6*d.* per gallon, as had been represented by *Cameron*, worth only about 1*s.* 6*d.*, and consequently that the warrants formed a totally insufficient security for the sums advanced upon them. Upon this discovery being made criminal proceedings were commenced against *Cameron*; and on the 6th and 7th of October, 1881, he appeared at the *Mansion House* to answer a criminal charge. Upon this occasion *Hiscock* was examined, and the

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Plaintiff was in attendance at the request of *Hiscock's* solicitors. In the course of *Hiscock's* examination the presiding magistrate inquired how he became acquainted with *Cameron*, to which he replied that *Lound* had introduced him. Thereupon the prosecuting counsel remarked that other parties were implicated in the fraud. In the result, on the 7th of October, 1881, *Cameron* was committed for trial. It was stated by the Plaintiff that at the close of the proceedings he asked *Hiscock* who the other parties implicated were, and that he replied, "You are one of them." This was not admitted by *Hiscock*.

On the 12th of October there was an interview between the Plaintiff and *Hiscock* at the *Inns of Court Hotel*, which took place in consequence of two urgent notes addressed to him by *Hiscock* on the same day.

There was a conflict of evidence as to what took place at this interview. According to the Plaintiff, *Hiscock* said, he the Plaintiff, had to sign a bond for £3000 or else he would be included in the prosecution. According to *Hiscock* he simply reproached the Plaintiff with his losses, and asked him what he was going to do, to which the Plaintiff replied that he would do his best to make reparation.

Hiscock, however, admitted on cross-examination that he mentioned to the Plaintiff at this interview that his aunt and some of his relations said that the Plaintiff ought to be in the dock as well as *Cameron*, and that in answer the Plaintiff said that at his father's death, if he could not get it before, he would make up the loss to him, or a part of it.

The bond and deed were not executed on that occasion, and the Plaintiff said in his examination in chief that he intended to investigate the matter before he signed anything.

On the 13th of October the Plaintiff and *Hiscock* met at the office of *Addison*, the accountant, and the bond and mortgage were there executed.

The Plaintiff, *Hiscock*, and *Addison* were all examined and cross-examined at considerable length as to the circumstances attending the execution. The effect of their evidence was shortly as follows:—The Plaintiff stated that *Hiscock* said he must compel him to sign the bond, as his aunt, from whom he had expecta-

tions, was forcing him, *Hiscock*, to do so, and that if he, the Plaintiff, did not sign he should be put in the dock with *Cameron*. The Plaintiff also stated that he knew that *Hiscock's* case was merely a threat, that he wanted some money from his father, and knew that if his name appeared in the papers he would not get it, and that his real object was to keep his name out of the papers in connection with a criminal charge.

Addison said that he prepared the bond and mortgage; that *Hiscock* said that if the Plaintiff signed the documents he would not include him in the criminal charge, and would instruct counsel to withdraw any observations as to the Plaintiff's character; that he (*Addison*) advised the Plaintiff to sign them as a matter of expediency on account of his father, with whom he (*Addison*) was at the time negotiating an advance for the Plaintiff, that every one knew *Hiscock* had no legal claim against the Plaintiff and not more than a moral obligation; that the bond was to satisfy *Hiscock's* aunt, and was intended as a guarantee to *Lound* against legal proceedings, which the witness explained to mean criminal proceedings, for no civil proceedings were suggested, and that he considered at the time that the deeds, though expedient, were worthless.

Hiscock in the course of his evidence in chief repeatedly denied having threatened the Plaintiff with criminal proceedings, and stated that he believed that he had, and told the Plaintiff that he had, a civil claim against him for the introduction to a known swindler, although he did not charge him with being a party to the fraud, and that what he told the Plaintiff was that his relations said he ought to be in the dock.

The view which was taken by the Court as to the result of the evidence will be found in the judgment.

On the 21st of October, 1881, *Cameron* was tried at the Old Bailey. On that occasion the prosecuting counsel made a statement to the effect that no imputation attached to the Plaintiff, who had acted perfectly honestly in the matter.

As to this *Hiscock* stated in cross-examination that his solicitors had with his concurrence instructed counsel to state at the Old Bailey that there was no criminal charge attaching to the Plaintiff.

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W. Pearson, Q.C., *Hastings*, Q.C., and *Crawley*, for the Plaintiff:—

The bond and mortgage in this case were executed under duress and threats of criminal proceedings, and the only real consideration for them was the abandonment of such proceedings. The consideration was either wholly, or in part, at all events, illegal. Both documents are accordingly void: *Ellis* v. *Barker* (1); *Fisher* v. *Apollinaris Company* (2); *Osbaldiston* v. *Simpson* (3); *Clubb* v. *Hutson* (4); *Keir* v. *Leeman* (5); *Davies* v. *London and Provincial Marine Insurance Company* (6); *Seear* v. *Cohen* (7); *Williams* v. *Bailey* (8).

Buckley, Q.C., and *W. Donaldson Rawlins*, for the Defendant:—

Hiscock was a young and inexperienced person. *Lound* was his solicitor so far as he had one. The circumstances were such as to constitute a civil obligation or liability on *Lound's* part towards *Hiscock*. This being so, it was not illegal to enforce the civil obligation by the threat of criminal proceedings, or to require security for, or compromise the liability or the criminal proceedings: *Flower* v. *Sadler* (9); *Ward* v. *Lloyd* (10); *Fisher* v. *Apollinaris Company*; *In re Mapleback* (11); *Ex parte Leslie* (12). In *Williams* v. *Bayley* the father was himself under no liability, and had no consideration for agreeing to relieve his son from liability, as is pointed out in *Flower* v. *Sadler*. Here *Lound*, who was *Hiscock's* solicitor, introduced *Cameron* to him, and was accordingly responsible to *Hiscock*, or, at all events, believed himself to be so, and the transaction of which these documents formed part was good as a compromise of a disputed claim: *Callisher* v. *Bischoffsheim* (13); *Miles* v. *New Zealand Alford Estate Company* (14). There was, however, in this case no agreement to abstain from prosecution, and the evidence shews that no criminal proceedings were in reality ever contemplated or

(1) Law Rep. 7 Ch. 104.
(2) Ibid. 10 Ch. 297.
(3) 13 Sim. 513.
(4) 18 C. B. (N.S.) 414.
(5) 9 Q. B. 371.
(6) 8 Ch. D. 469, 476.
(7) 45 L. T. (N.S.) 589.
(8) Law Rep. 1 H. L. 200.
(9) 10 Q. B. D. 572.
(10) 6 Man. & G. 785.
(11) 4 Ch. D. 150.
(12) 20 Ch. D. 131.
(13) Law Rep. 5 Q. B. 449.
(14) 32 Ch. D. 266.

threatened, and that *Lound* never thought there was any real danger of them. There was accordingly no duress, and *Lound* only executed the documents as a matter of expediency, with the view to obtaining money from his father, and to keep his name out of the newspapers, which is not an illegal consideration.

Hastings, in reply:—

There were threats of criminal proceedings, whether or not there was any real intention of bringing them. But the Plaintiff gave no guarantee when he introduced *Hiscock* to *Cameron*, and there was no civil liability whatever on his part towards *Hiscock*. There could be no compromise as there was no claim.

[He referred to *Bracewell* v. *Williams* (1) and *Waite* v. *Jones* (2).]

1888. May 16. STIRLING, J. (after stating the bond, mortgage, and issue that had been tried before him, continued:—]

It is alleged on behalf of the Plaintiff that the deed and bond in question were executed by him under threats of criminal proceedings, and that the real consideration was the abandonment by *Hiscock* of such proceedings. On behalf of the Defendant it is denied that any such criminal proceedings were ever threatened, and it is contended that the consideration for the deed and bond was the compromise of a civil liability on the part of the Plaintiff towards *Hiscock*.

Both the Plaintiff and *Hiscock* were called as witnesses and gave evidence before me. Neither appeared to me a very reliable witness; and the evidence of each seemed to be considerably biassed towards that view of the issue which he supported.

The following is an outline of the more material facts proved and evidence given on the trial of the issues:—[His Lordship then stated the evidence to the effect set forth above, and then continued:—]

Upon the whole evidence I have arrived at the following conclusions:—

1. The "legal proceedings" mentioned in the bond were meant to include, and did include, criminal proceedings.

(1) Law Rep. 2 C. P. 196. (2) 1 Bing. (N.C.) 656.

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2. By the "other consequences" mentioned in the bond were meant the public mention at the trial, or in the newspapers, or otherwise, of the Plaintiff's name in connection with the criminal proceedings against *Cameron*.

3. The consideration for the bond and mortgage included promises on the part of *Hiscock* that no criminal proceedings should be commenced against the Plaintiff, and that the pending criminal proceedings against *Cameron* should be conducted in such a way that either the Plaintiff's name should not be mentioned, or that if it was mentioned the Plaintiff should be exonerated from all blame in connection with the transactions.

4. Criminal proceedings against the Plaintiff were not seriously contemplated by *Hiscock* nor apprehended by the Plaintiff.

5. The bond and mortgage were not executed under pressure of threats of criminal proceedings by *Hiscock*, nor under the influence of any undue pressure on his part, but were executed by the Plaintiff under the advice of *Addison*, mainly to avoid his name being publicly connected with the fraudulent dealings of *Cameron* and the criminal proceedings against him, but also to prevent the failure of pending negotiations for a loan from the Plaintiff's father, which might have fallen through if the Plaintiff's name had been mixed up with the pending proceedings.

Under these circumstances I am of opinion that the consideration was partly illegal. It included, as I think, not only a stipulation that no criminal proceedings should be begun against the Plaintiff; but also stipulations as to the conduct of the pending criminal proceedings against *Cameron*, by which the course and result of those proceedings might have been affected. Now in *Egerton* v. *Earl Brownlow* (1) Lord *Lyndhurst* says: "It is admitted, that any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void." And he accepts that as an accurate statement of the law, though he doubtless applies it to a state of circumstances widely different from those which occur in the present case. Upon this principle it has been repeatedly held that agreements tending to affect the course of legal proceedings are illegal, even although those proceedings may not be strictly criminal in their nature. Thus an

(1) 4 H. L. C. 1, 163.

agreement to pay money in consideration of the withdrawal of opposition to the discharge of an insolvent has been held to be illegal: *Hall* v. *Dyson* (1); *Hills* v. *Mitson* (2). In *Elliott* v. *Richardson* (3) an agreement by a shareholder in a company which was being compulsorily wound up that he would endeavour to postpone the making of a call was held to be illegal on the ground that it amounted to an interference with public justice; see especially the judgment of Mr. Justice *Willes* (4) with which the other Judges (*Keating*, J., and *M. Smith*, J.) agreed. *A fortiori*, must an agreement which tends to interfere with the course of criminal proceedings be illegal.

As part of the consideration is illegal it follows that the whole is bad: *Featherston* v. *Hutchinson* (5); *Waite* v. *Jones* (6); *Shackell* v. *Rosier* (7). I find, therefore, that the bond and indenture of the 13th of October, 1881, were obtained by *William Lush Hiscock* from the Plaintiff, *John Adams Lound*, partly for an illegal consideration and by reason thereof were obtained without good and sufficient consideration, but that they were not nor was either of them obtained by duress.

Solicitors: *Arthur Price; G. Castle.*

(1) 17 Q. B. 785.
(2) 8 Ex. 751.
(3) Law Rep. 5 C. P. 744.
(4) Law Rep. 5 C. P. 748.
(5) 1 Cro. Eliz. 199.
(6) 1 Bing. (N.C.) 656, 662.
(7) 2 Bing. (N.C.) 634.

W. W. K.

STIRLING, J.

1888

May 31.

In re CHINERY.
CHINERY *v.* HILL.

[1887 C. 4183.]

Will—Construction—Gift to a Class—Substitutionary Gift to Child of Member of Class who shall die in Testator's Lifetime—Child of Member who was dead at Date of Will.

A testator bequeathed a residuary fund upon trust for the equal benefit of his sisters, nephews, and nieces, as to the shares of his nephews absolutely, and as to the shares of his sisters and nieces upon trust to invest the principal moneys forming their shares, and to pay the dividend to each such sister and niece for life for her separate use, and after the death of each sister to apply her share for the benefit of his said nieces equally upon the trusts of their original shares, "and after the death of each niece upon trust to pay her share to such of her children as she shall by will appoint, and in default of appointment to her children equally on attaining the age of twenty-one years, and if no such children then on trust for the survivors or survivor of my said nieces. If any niece shall die in my lifetime her share shall be for the benefit of her child or children, but if no such children who shall live to attain the age of twenty-one years, then such share shall be for the benefit of my surviving nieces equally, and upon the same trusts":—

Held, that the child of a niece who died before the date of the will did not take.

Christopherson v. *Naylor* (1) followed.

In re Smith's Trusts (2) not followed.

ORIGINATING SUMMONS.

John Chinery, by his will, dated the 21st of March, 1885, gave all his real and leasehold estates and moneys secured on mortgage to trustees, upon trust to sell the real and leasehold estates, and to call in any moneys secured on mortgage, and out of the proceeds to pay his debts, funeral and other expenses, and certain legacies, and also the principal moneys forming the shares of his nephews thereinafter mentioned, and after payment thereof, "upon trust to apply the balance of such proceeds for the equal benefit of my sisters, nephews, and nieces, such nephews and nieces being the children of my late brother, *Edward Chinery*, deceased, and of my sisters *Elizabeth Antoinette Hilliard*, and *Emma Watts*, and of my

(1) 1 Mer. 320. (2) 5 Ch. D. 497, n.

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niece, *Emma Chalmers*, formerly *Helen Hilliard*, in manner following: namely, as to the shares of my nephews upon trust to pay the same to them absolutely, and as to the shares to my sisters and nieces upon trust to invest the principal moneys forming their shares" . . . (in manner therein specified) "and to pay the dividends unto each such sister and niece for her life for her sole and separate use, and after the death of each sister upon trust to apply her share for the benefit of my said nieces equally upon the like trusts as herein declared with respect to the original shares of such nieces, and after the death of each niece upon trust to pay her share to such of her children as she shall by will appoint, and in default of such appointment to her children equally on attaining the age of twenty-one years, and if no such children then in trust for the survivors or survivor of my said nieces. If any niece shall die in my lifetime her share shall be for the benefit of her child or children, but if no such children who shall live to attain the age of twenty-one years, then such share shall be for the benefit of my surviving nieces equally, and upon the same trusts." The testator then made certain dispositions of his personal estate, money, stocks and effects, and concluded, "and I direct my said trustees to pay and satisfy out of the proceeds of my said real estate, leaseholds, and mortgage securities the sum of £300 each for the benefit of each of my said nieces over and above the amount of her share hereinbefore described to be applied for her benefit and upon the same trusts."

The testator died on the 23rd of September, 1886, and there were living at his death three of his sisters, viz., *Elizabeth Antoinette Hilliard*, *Emma Watts*, and *Anna Chinery*, and several of his nephews and nieces.

The testator's sister, *Elizabeth Antoinette Hilliard*, had a daughter named *Catharine*, who married General *Cracroft*. *Catharine Cracroft* died on the 5th of July, 1867, before the date of the testator's will, leaving one child her surviving, namely, *Walter Bernard Cracroft*, who had attained twenty-one and was still living.

This was an originating summons taken out by *Anna Chinery*, to determine (*inter alia*) the question whether *Walter Bernard Cracroft* was entitled to any and what share under the will.

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Haldane, in support of the summons :—

This is not an independent gift, but a substitutional gift under which no child of a niece can take unless his or her parent was living and capable of taking at the date of the will; and the case is governed by *Christopherson* v. *Naylor* (1), and does not fall within *Loring* v. *Thomas* (2).

In *Hotchkiss's Trusts* (3) *Christopherson* v. *Naylor* was treated as a binding authority and followed, notwithstanding that it was disapproved of by *Malins*, V.C., in *In re Potter's Trust* (4), and *James*, V.C., there shews that there was a substantial distinction between those two cases. It is true that the decision of *Jessel*, M.R., in *In re Smith's Trusts*, reported in a note to *In re Sibley's Trusts* (5) is apparently in conflict with *Christopherson* v. *Naylor*, but *In re Smith's Trusts* ought not to be followed, as it is contrary to the general current of authority, which is in favour of *Christopherson* v. *Naylor*: *West* v. *Orr* (6); *In re Webster's Estate* (7).

Edward Ford, for other persons in the same interest.

Alexander Young, for *Walter Bernard Cracroft*:—

In *West* v. *Orr* the testator fixed upon a class which was to survive his wife, and obviously that class could not include a person then already dead, and this was the *ratio decidendi*. *Christopherson* v. *Naylor*, and *Hotchkiss's Trusts* were both cases of gifts of legacies, and in each case the principle of the decision was that you cannot give a legacy to a dead person. In this will there is a direct independent gift to a composite class made up of sisters, nephews, and nieces, and the children of deceased nieces, and including the children of a niece who shall have died as a member of the class, and not by way of substitution. For the words "shall die," are equivalent to "shall have died." There is a distinction between a gift of a legacy and a gift of a share as one of a class, and this case is governed by *Loring* v. *Thomas* (8), which was followed by *In re Woolrich* (9). I rely also on *In re*

(1) 1 Mer. 320.
(2) 1 Dr. & Sm. 497.
(3) Law Rep. 8 Eq. 643.
(4) Ibid. 52.
(5) 5 Ch. D. 497, n.
(6) 8 Ch. D 60, 68.
(7) 23 Ch. D. 737.
(8) 1 Dr. & Sm. 511.
(9) 11 Ch. D. 663.

Potter's Trust (1) which was followed in *Adams* v. *Adams* (2) and in *In re Smith's Trusts* (3), where *Jessel*, M.R., shews how unreasonable it would be to attribute to a testator the intention to exclude a child whose parent died immediately before the date of the will from a benefit it would have taken if its parent had died immediately after. There is now a stronger tendency than ever to give effect to the intention of the testator when it can be ascertained, and here the obvious intention was that his nieces' children should take whether their parents were alive or dead at the date of the will.

Haldane, in reply.

STIRLING, J. (after stating the will, continued):—

At the time when this will was made a niece was dead leaving a child, who survived the testator; and the question is whether that child is entitled to take what the testator calls the niece's share—that is the share which his mother would have taken if she had survived the testator. Now, there is, as has been pointed out, a considerable conflict of authority on this point.

As regards the first case which was referred to, *Christopherson* v. *Naylor* (4), after what has been said by the Court of Appeal in *West* v. *Orr* (5) and other cases, it seems to me that that is a decision which I am bound to follow; and that the observations in the case of *In re Potter's Trust*, which treat *Christopherson* v. *Naylor* as overruled, are not binding on me.

Coming then to the authorities more directly in point, the cases seem to divide themselves into two classes—cases governed by *Loring* v. *Thomas* (6), on the one hand, and cases governed by *In re Hotchkiss's Trusts* (7), on the other. In *Loring* v. *Thomas* there was a bequest of one-fourth of the moneys to arise from the sale of real estate to the children of the testatrix's then deceased aunt, *Dorothy Davies*, with a proviso that in case any child of *Dorothy Davies* should die in the testatrix's lifetime leaving

(1) Law Rep. 8 Eq. 52.
(2) Ibid. 14 Eq. 246.
(3) 5 Ch. D. 497, n.
(4) 1 Mer. 320.
(5) 8 Ch. D. 60.
(6) 1 Dr. & Sm. 497.
(7) Law Rep. 8 Eq. 643.

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children who should be living at the testatrix's death, and who should live to attain the age of twenty-one, such last-mentioned children should represent and stand in the place of their deceased parent, and should be entitled to the same share which their dead parent would have been entitled to if living at the testatrix's decease. Upon that Vice-Chancellor *Kindersley* held that the children of a child of *Dorothy Davies* who was dead at the date of the will were entitled to a share. Now what are the grounds on which he so decided? As I read his judgment, the Vice-Chancellor decides the question on the particular language of the will, and mainly on the ground that the gift was not of "the share of the deceased parent," but of "the share which the deceased parent would have been entitled to if living at the testatrix's decease." At p. 515 he says this: "Proceeding, then, to the subsequent part of the clause, what is to be the consequence of any child or children of *Dorothy Davies* dying in the testatrix's lifetime. Disencumbering the sentence from superfluous words, which do not affect the sense, the testatrix directs thus:—'Then and in such case the children of each such child so dying in my lifetime shall represent and stand in the place of their deceased parent, and shall be entitled to the same share which their deceased parent would have been entitled to if living at the time of my decease.' The testatrix does not say, 'shall be entitled to their parent's share,' nor does she say, 'shall be entitled to the share hereby intended for their parent,' but she says, 'shall be entitled to the same share which their deceased parent would have been entitled to if living at the time of my decease.' The share which she says that the children of a deceased child shall be entitled to is not a share which that deceased child will take, or can take, or is intended to take; but it is the share which that deceased child would have been entitled to upon a certain hypothesis, namely, the hypothesis of that child being alive at the testatrix's death; and unquestionably *Thomas*, the predeceased child of *Dorothy Davies*, would, upon the hypothesis of his being alive at the time of the testatrix's death, have been entitled to a share under the bequest to the children of *Dorothy Davies*."

In my opinion the *ratio decidendi* of that case was that what

the children were to have taken was not the share of their deceased parent, but the share which their deceased parent would have been entitled to on a certain hypothesis.

That is confirmed by what is said at p. 511: "And first, I would observe, that with reference to a bequest to the children of *A.*, there is this obvious distinction between a child of *A.* living at the date of the will and a predeceased child of *A.*, that the former is one of those whom the testator intends to benefit by the bequest, whereas the latter not only cannot take under such a bequest, but he is not intended by the testator to benefit, for no one intends to make a bequest in favour of a dead person. If, therefore, a testator in directing that the issue of a deceased child shall represent or stand in the place of their parent, uses language importing that they shall take the share which he intended for the parent, of course the issue of a predeceased child cannot be included, because the testator could not have intended to give any share to a child then already dead." Now that case, as has been pointed out by Mr. *Young*, has been treated as a binding authority and followed by Vice-Chancellor *Hall* in *In re Woolrich* (1); and further, it is regarded as a binding authority in *In re Hotchkiss's Trusts* (2), which is distinguished from it by Vice-Chancellor *James* who decided it. He there (3) says: "It seems to me the question to be determined is always this—whether the case comes within the doctrine of *Christopherson* v. *Naylor* (4) or within the principle of *Loring* v. *Thomas* (5), upon which *In re Potter's Trust* (6) appears to have been decided." He then comments on *In re Potter's Trust* and treats it as a similar case to *Loring* v. *Thomas*, the share which was bequeathed in *In re Potter's Trust*, being not the share of the deceased parent, but the share which the deceased parent would have been entitled to upon a certain hypothesis. That is the ground on which *In re Potter's Trust* is distinguished. But in *In re Hotchkiss's Trusts* there was a bequest to first cousins to be equally divided between them, and the will continued: "And I give the share or shares of those of my first cousins (if any) who may die in my lifetime, unto all

(1) 11 Ch. D. 663.
(2) Law Rep. 8 Eq. 643.
(3) Ibid. 648.
(4) 1 Mer. 320.
(5) 1 Dr. & Sm. 497.
(6) Law Rep. 8 Eq. 52.

STIRLING, J. 1888 *In re* CHINERY. CHINERY *v.* HILL.

and every the children of all my first cousins who may so die in my lifetime, share and share alike, such shares to be taken *per capita* and not *per stirpes*." There the Vice-Chancellor says (1): "It is contended that because you could not have predicted that any one of the persons described would take a share, you must read the gift as if it had been, 'And I give the share which any first cousin who may be dead in my lifetime would have taken had he lived, unto all and every the children of all my first cousins who may die in my lifetime'—that is to say, as a substantive gift to a new class of persons altogether. But that would be to introduce into the will words of contingency which are not to be found in it. I think a fallacy arises from applying to the construction of these instruments that rule which says that the class is to be ascertained at the death of the testator; because, *primâ facie*, a testator must be supposed to have had in view living persons, subject to the contingency of such persons continuing to live up to the time of his death." Upon comparing the judgment in *In re Hotchkiss's Trusts* (2) with that in *Loring* v. *Thomas* (3), I come to the conclusion that Vice-Chancellor *James* and Vice-Chancellor *Kindersley* were really of the same mind as to the construction to be put upon the two classes of gifts; and if Vice-Chancellor *Kindersley* had had to decide *In re Hotchkiss's Trusts*, I think it clear that he would have come to the same conclusion as Vice-Chancellor *James*. On the other hand, there is one weighty authority in the opposite direction, *In re Smith's Trusts* (4). There the gift was, "If *Sarah Smith* should have any money at her death, she wishes it to be equally divided amongst her brothers and sisters after all expenses are paid. Should any of her brothers or sisters be dead, their share is to be equally divided amongst their children." What the Master of the Rolls says is this: "The question is, whether I am to attribute to this testatrix the capricious intention that, if a brother died before her will, his children should not take, but that, if a brother died after her will, his children should take. I am of opinion that I am not bound to do anything of the sort. She gives her money to be equally divided amongst her brothers and sisters,

(1) Law Rep. 8 Eq. 649.
(2) Ibid. 643.
(3) 1 Dr. & Sm. 497.
(4) 5 Ch. D. 497, n.

and then she says, 'should any of her brothers and sisters be dead, their share is to be equally divided amongst their children.' The words 'their share' cannot mean a share given to a brother or sister who is dead, because you cannot give a legacy to a dead person, as the testatrix must have known; and consequently 'their share' must mean 'the share which they would if living have taken.'" That appears to me to be in direct conflict with what is laid down by Vice-Chancellor *James* in *In re Hotchkiss's Trusts* (1), where he says that to treat the gift in that way is to introduce into the will words of contingency which are not to be found in it. I think also that it is plainly opposed to the views expressed by Vice-Chancellor *Kindersley* in *Loring* v. *Thomas* (2). I confess that, apart from the authorities, I should have had a strong inclination to follow the opinion of the late Master of the Rolls, which seems to me more likely to give effect to the testator's intention; but the weight of authority is against his view, and I think I ought to follow the opinion of Vice-Chancellor *Kindersley* and Vice-Chancellor *James*. I hold, therefore, that the child of the niece who died before the date of the will does not take.

Solicitors: *Underwood, Son, & Piper; Sanderson & Holland.*

(1) Law Rep. 8 Eq. 643. (2) 1 Dr. & Sm. 497.

W. W. K.

STIRLING, J.

1888

May 17;
July 3.

In re ONSLOW.
PLOWDEN *v.* GAYFORD.

[1887 O. 596.]

Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 2, 19—*Interest of Married Woman in Fund comprised in Settlement on former Marriage —Absolute Reversion with Power to appoint by Will, or when discovert by Deed—Addition of Separate Use under Act of* 1882—*Right to a Transfer of the Fund without Release of the Power.*

By a marriage settlement made in 1878 a fund was settled upon trust to pay the income to the wife for life, and during her then intended coverture, such income was to be for her separate use, and after her death the fund was to be held in default of children in trust for such persons as the wife should during coverture by will, and when discovert by deed or will appoint, and in default, if the wife should survive the husband, in trust for her, her executors, administrators, and assigns.

The husband died in 1880. There was no issue of the marriage. The lady married again, after the *Married Women's Property Act*, 1882, and no settlement was made on that marriage.

Upon a summons taken out by her and her second husband to have it determined whether she could release the power of appointment by will given to her by the settlement, and call for a transfer of the settled property:—

Held, that if the lady had come to the Court immediately before her second marriage she would have been entitled to have the settled property transferred to her, and that the *Married Women's Property Act*, 1882, had added the incident of separate use to her interest in such property, so that the lady and her husband were now entitled to have that property made over to them without any release by her of the power.

Adjourned summons.

By a settlement dated the 17th of June, 1878, and made upon the marriage of Mrs. *Onslow* with Mr. *Stoate*, certain property was settled upon trust to pay the income thereof to the wife during her life, and during her then intended coverture such income was to be for her separate use without power of anticipation; and after her death the fund was to be held upon certain trusts for the benefit of the husband and the children of the marriage, and in default of children, in trust for such persons and purposes as the wife should, during coverture by will, and when discovert by deed or will, appoint, and in default of appoint-

ment, if the wife should survive the husband, then in trust for her, her executors, administrators, and assigns.

Mr. *Stoate* died in 1880, and there was no issue of the marriage. Mrs. *Stoate* married Colonel *Plowden* in the year 1887, and no settlement was executed on such marriage. This was an originating summons taken out by Colonel and Mrs. *Plowden* under Order LV., r. 3, in order to have it determined by the Court whether, under these circumstances, Mrs. *Plowden* could release the power of appointment given to her by the settlement in default of children, and if so, whether the trustees could, upon the execution of such release, properly transfer the funds and property subject to the settlement to Mrs. *Plowden*.

W. N. Lawson, for Colonel and Mrs. *Plowden*, in support of the summons:—

The "coverture" mentioned in the settlement is the then intended coverture and no other: *Morris* v. *Howes* (1); *Horseman* v. *Abbey* (2); and accordingly the power to appoint by will "during coverture," is a power which only subsisted during the then intended coverture. That coverture has come to an end, and there have been no children of the marriage, so the power is gone, and under the original settlement Mrs. *Plowden* was, at the time of her present marriage, absolutely entitled to the settled fund.

If not, she was, at all events at the time of her present marriage, in a position to acquire the absolute dominion over the fund: *Holloway* v. *Clarkson* (3); *Devall* v. *Dickens* (4); *Kirkpatrick* v. *Capel* (5); *Page* v. *Soper* (6).

Then under the *Married Women's Property Act*, 1882, s. 2, she was entitled to hold as her separate property and to dispose of all real and personal property which belonged to her at the time of the marriage; and this property was virtually property belonging to her at that time.

If, however, the power is still a subsisting power, she can release it under the *Conveyancing Act*, 1881, sect. 52, or the *Con-*

(1) 4 Hare, 599.
(2) 1 Jac. & W. 381, 385.
(3) 2 Hare, 521.
(4) 9 Jur. 550.
(5) V.-C. of E., 1819; Sugd. Powers, 7th Ed. p. 80.
(6) 11 Hare, 321.

STIRLING, J. 1888 *In re* ONSLOW. PLOWDEN *v.* GAYFORD.

veyancing Act, 1882, sect. 6; or again, she might release the power under *Sir R. Malins' Act* (20 & 21 Vict. c. 57), s. 1.

Curtis Price, for the Trustees:—

The lady being now married her interest in the fund is two-fold. First, she can, under her power, which is still subsisting, appoint by will; but that does not now help her. Secondly, under the limitation to her, her executors, administrators, and assigns, she has only a reversionary interest expectant on her death without exercising the power, and this interest she cannot dispose of during coverture, because *Malins' Act* (20 & 21 Vict. c. 57), does not apply to any settlement on marriage: sect. 4.

The cases cited are not cases of women under coverture, and the *Married Women's Property Act*, 1882, does not apply, because sect. 19 provides that nothing in the Act shall interfere with or affect any settlement made or to be made, whether before or after marriage, respecting the property of any married woman.

Lawson, in reply:—

The exception of interests in personal estate under settlements in the 4th section of *Malins' Act* only extends to dispositions by married women, and does not affect the power conferred by the 1st section to release or extinguish any power she may be possessed of. This is not an interference with or an affecting of the settlement within the meaning of sect. 19 of the *Married Women's Property Act*, 1882.

1888. July 3. STIRLING, J.:—

In this case I have come to the conclusion that the Applicants are entitled to succeed. The funds in question are held under the trusts of a settlement made upon a former marriage of Mrs. *Plowden* upon trust, in the events which have happened, for her during her life, and after death upon trust for such persons as she shall by will appoint, and in default of appointment for herself. Her former husband having died she married Colonel *Plowden* after the commencement of the *Married Women's Property Act*. If she had come to the Court immediately before her marriage with Colonel *Plowden* it is clear that she would have

been entitled to have the trust funds transferred to her. That is shewn by the cases of *Holloway* v. *Clarkson* (1), *Devall* v. *Dickens* (2), and *Page* v. *Soper* (3), to which I was referred. On the other hand, I apprehend that under the law as it stood previously to the passing of the *Married Women's Property Act*, the present application would not have succeeded. See the case of *Whittle* v. *Henning* (4). The question then arises does the *Married Women's Property Act* apply? It is said that it does not by reason of sect. 19, which provides that nothing in the Act "shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman." That section, no doubt, presents a difficulty, but, having regard to the recent decision of the Court of Appeal in *In re Armstrong* (5), I think that it was not intended to prevent the Act from making Mrs. *Plowden's* interest in these settled funds (whatever that interest may be) her separate property, because that is not an interference with the settlement within the meaning of the section. In *In re Armstrong* Lord Justice *Lindley* said that the words "interfere with or affect any settlement" meant invalidate or render inoperative any settlement; and he observes that the Legislature draws a distinction between interfering with a settlement and affecting an estate created by the settlement. Lord Justice *Lopes* concurred in this view. The Master of the Rolls dissented.

That being the interpetration put upon the words "interfere with or affect any settlement" by the majority of the Court, it would seem to follow that the effect of the settlement is to be determined just as it would have been under the old law, and that no one who under that law could have taken any interest is to be deprived of such interest: but that where these principles have been applied, and it has been ascertained that the married woman takes an interest under the settlement, the incidents annexed by the Act to the property of married women attach to the interest so taken by her; and consequently that in the present case whatever interest Mrs. *Plowden* now takes she holds as a *feme*

(1) 2 Hare, 521.
(2) 9 Jur. 550.
(3) 11 Hare, 321.
(4) 2 Ph. 731.
(5) 32 Sol. J. 577.

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sole for her separate use. It may be that the husband takes an interest, just as he did before the Act, but he is *sui juris*, and can dispose of his interest, and he joins in the present application.

The result is that the Act applies so far as to add the incident of separate use to whatever interest Mrs. *Plowden* takes under the settlement. That being so, the Applicants are the only persons who have any interest in the fund, and are entitled to have the funds paid over to them, and I make an order upon the trustees to pay the same accordingly.

Solicitors: *J. H. & J. Y. Johnson; Frederick Taylor.*

W. W. K.

STIRLING,J. 1888 *May* 30, 31; *July* 12.

In re LAMBERT'S ESTATE. STANTON *v.* LAMBERT.

[1888 L. 367.]

Married Woman—Death of, without disposing of Separate Personal Estate—Devolution—Title of Husband—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 1—*Probate Rules*, 1887—*Costs.*

The *Married Women's Property Act*, 1882, has not altered the devolution of the undisposed of separate personalty of a married woman. Accordingly, on the death of a married woman without disposing of her separate personalty, the quality of separate property ceases, and the right of the husband to such undisposed of personalty accrues as if the separate use had never existed.

A married woman who had a power of appointment over certain trust funds, and was also possessed of separate estate her title to which had accrued before the *Married Women's Property Act*, 1882, died in 1887, having in the same year made a will, by which she exercised her power of appointment over the trust fund and appointed executors, but made no disposition of her separate property. Probate of the will was granted to the executors according to the altered practice introduced by the Probate Rules of 1887, *i.e.*, in the ordinary form without any exception or limitation:—

Held, that on the death of the testatrix the title of her husband to her undisposed of separate estate accrued, and that the executors of her will became trustees of it for him, and not for the next of kin of the testatrix:—

Held also, that the expenses of proving the will, including the probate duty, must be apportioned rateably between the appointed and undisposed

of property in the same manner in which they would have been apportioned under a grant *cæterorum* before the change in the form of the grant: but that the costs of the proceedings in which the questions were determined must fall upon the undisposed of property, as they were occasioned by a contest between the husband and the next of kin.

THE testatrix *Agnes Lambert* married *Richard Umfraville Lambert* in 1867, and died in September, 1887, leaving her husband and three infant children surviving her.

Under the will of her mother the testatrix had a general power of appointment by deed or will over certain trust funds, and by her will dated the 7th of September, 1887, she exercised this power in favour of her husband and children, and appointed executors, but made no further disposition of any property belonging to her. On the 30th of November, 1887, probate of the will was granted under the Probate Rules, 1887, in the ordinary form, and without any restriction or limitation, to the executors named in the will (1).

The testatrix was at the time of her death entitled to certain separate estate including a considerable sum of cash at the bank, representing savings of income arising since the passing of the *Married Women's Property Act*, 1882, from property to which she was entitled for her separate use, and her title to which had accrued prior to the passing of the Act.

After the death of the testatrix a summons was taken out by the executors of her will under Order LV., rule 3, to have the following, amongst other questions, determined by the Court, viz., who are entitled to such part of the personal estate of the said

(1) The Probate Rules of March, 1887, rr. 15 and 18 (W. N. 1887, Part II., p. 172), are as follows:—

"In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed without any exception or limitation, and issue to an executor or other person authorized in usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next of kin of the testatrix in case of a partial intestacy."

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Agnes Lambert deceased as is not beneficially disposed of by her said will, and in what shares and proportions.

C. Ashworth James, in support of the summons.

L. H. Jenkins, for the children of the testatrix:—

The undisposed of personal property of the testatrix devolves upon her children as next of kin. She has made a will and appointed executors, and under the Probate Division Rules of 1887 general probate in the ordinary form has been granted to them. Under these rules it is no longer necessary to recite in the grant or the oath to lead the same, the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made, and the probate extends to all the personal estate of the testatrix without exception or limitation. Here the appointment of executors was a disposition by the testatrix in favour of them, to the benefit of which they themselves would have been entitled prior to 11 Geo. 4 & 1 Will. 4, c. 40, and to the benefit of which since the passing of that Act the next of kin are entitled. Her entire separate personal estate has accordingly passed to the executors, and they hold it as trustees for her next of kin, *i.e.*, the children, for the husband is not entitled under the *Statute of Distributions*: 22 & 23 Car. 2, c. 10, s. 3; 11 Geo. 4 & 1 Wm. 4, c. 40, s. 1; *Garrick* v. *Lord Camden* (1); *Milne* v. *Gilbart* (2).

[STIRLING, J.:—The form in which probate is granted cannot affect the rights of the beneficiaries. [His Lordship referred to *Squib* v. *Wyn* (3) and *Elliot* v. *Collier* (4)].]

The alteration in the Probate Rules was made in consequence of the *Married Women's Property Act*, 1882, and the decision in *The Goods of Amelia Price* (5). Under the *Married Women's Property Act*, 1882, a married woman is rendered "capable of holding and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*."

(1) 14 Ves. 372.
(2) 2 D. M. & G. 715; 5 D. M. & G. 510.
(3) 1 P. Wms. 378.
(4) 3 Atk. 526.
(5) 12 P. D. 137.

In *The Goods of Amelia Price* (1) it was held that as the *Married Women's Property Act* had given to married women this power, the limitation inserted before that Act in the probate of the will of a married woman ought no longer to be required, and that the Court should thenceforth make a general grant. Accordingly, there having been this general grant, the Court has only to decide what are the trusts applicable to the property of the testatrix regarded as a *feme sole*, and in such property the husband can take no interest.

[He also referred to 20 & 21 Vict. c. 85, s. 21; *In the Goods of Stephenson* (2), *Scott* v. *Morley* (3); and the *Married Women's Property Act*, 1882, sects. 7, 13.]

Bryan Farrer, for the husband of the testatrix:—

There is nothing in the judgment of Mr. Justice *Butt* in *The Goods of Amelia Price*, to shew that the Court considered the *Married Women's Property Act*, 1882, to have altered the devolution of the beneficial interest in her separate property; and the decision is only as to the manner in which probate should issue.

The testatrix has not disposed by will or otherwise of the property now in question, and the Act of 1882 only applies to the holding of and dealing with property by the married woman during the coverture, giving her complete capacity for those purposes, and does not affect the devolution of her separate property on her death without having disposed of it. In the Act of 1882 there is no such provision as is contained in the *Divorce and Matrimonial Causes Act*, 1857 (20 & 21 Vict. c. 85), s. 25, that in cases of judicial separation the wife is to be considered as a *feme sole* with respect to property of every description which she may acquire, "and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead."

Accordingly she is not a *feme sole* for every purpose. On her death the beneficial interest in her undisposed of *choses in action*, whether her separate property or not, vests absolutely, not in her next of kin, but in her surviving husband, although prior to the

(1) 12 P. D. 137. (2) Law Rep. 1 P. & M. 287.
(3) 20 Q. B. D. 120, 132.

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Married Women's Property Act he had to take out administration to her before he could give a receipt for them. And if the wife has appointed an executor, the executor is trustee for him: *Proudley* v. *Fielder* (1); *In re Price* (2); *In re Shakespear* (3); *Palliser* v. *Gurney* (4); *Humphrey* v. *Bullen* (5); *In the Goods of M. A. Harding* (6); *The Statute of Frauds*, sect. 24.

Jenkins, in reply, referred to *Toller* on Executors (7); *Bacon's* Abridgment, *Baron* and *Feme* (8).

1888. July 12. STIRLING, J. (after stating the facts of the case, continued):—

The law as to the right of a husband surviving his wife to her *choses in action* has long been settled. Such *choses in action* could only be recovered by the legal personal representatives of the wife; but they were not in any way subject to the provisions of the *Statute of Distributions* (22 & 23 Car. 2, c. 10), it being expressly provided by sect. 25 of the *Statute of Frauds* (29 Car. 2, c. 3) that the *Statute of Distributions* "shall not extend to the estates of *feme coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act." Accordingly the husband when living was absolutely entitled to be the administrator of his wife. After his death, however, there were cases in which the Ecclesiastical Court considered itself bound to grant administration to the next of kin of the wife. Nevertheless, in equity, the title of the husband prevailed, and the administrator of the wife was held to be a trustee for the legal personal representative of the husband: see *Humphrey* v. *Bullen*; *Elliot* v. *Collier* (9); *Squib* v. *Wyn* (10). The equitable interest of the husband vested on the death of the wife, and passed not merely to his legal personal representatives,

(1) 2 My. & K. 57.
(2) 28 Ch. D. 709.
(3) 30 Ch. D. 169.
(4) 19 Q. B. D. 519.
(5) 1 Atk. 458.
(6) Law Rep. 2 P. & M. 394.
(7) 7th Ed. p. 223.
(8) 7th Ed., vol. i., p. 700.
(9) 3 Atk. 526; 1 Ves. Sen. 15
(10) 1 P. Wms. 378, 381.

but to his assignees in bankruptcy: *Drew* v. *Long* (1) a valuable decision of *Kindersley*, V.C.

It is next to be considered how the law stands when the *chose in action* has formed part of the separate property of the wife. It has long been settled that, as an incident to her separate estate, a married woman has the power of disposing by will of personalty which is her separate property. This has really never been questioned since the decision in *Fettiplace* v. *Gorges* (2) in 1789. Such wills were admitted to probate; but down to a recent period it was the usual practice, first, of the Ecclesiastical Courts, and subsequently of the Probate Court, to limit the probate to such property as the married woman had power to dispose of and had disposed of: and to grant administration *cæterorum* to the husband, the object apparently being to leave it to a Court of construction to determine what property passed by the will and what did not: see *Ledgard* v. *Garland* (3). Recently, however, changes have been introduced into this practice. Soon after the *Judicature Acts* came into operation it was decided by the Court of Appeal, in *In re Tharp* (4), that, whatever might have been the practice of the Court of Probate, it was the duty of the Probate Division, upon an application for probate of the will of a married woman dealing only with her separate estate to decide (so far as could properly and conveniently be done) of what such property consisted. In *Brownrigg* v. *Pike* (5), decided the 28th of February, 1882, before the passing of the *Married Women's Property Act*, 1882, a married woman having a power of appointment over real property executed the power in favour of herself. She afterwards made her will, by which she directed (amongst other things) that a portion of the property should be sold to pay legacies and erect a memorial window. She also appointed an executor. There were arrears of rent due at the time of her death and subsequently, and it was held that, as she possessed the property as separate estate, and had appointed an executor, and directed him to pay the legacies, &c., and as the arrears of rent were part of her personal estate, the will was entitled to probate. In that case

(1) 22 L. J. (Ch.) 717.
(2) 1 Ves. 46.
(3) 1 Curt. 286.
(4) 3 P. D. 76.
(5) 7 P. D. 61, 65.

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Sir James *Hannen*, towards the close of his judgment, says: "By appointing an executor her separate personal estate vests in him, to be got in by him, and applied either according to the provisions of the will or as the law directs. For these reasons I hold that this will is entitled to be admitted to probate, and I overrule the demurrer, and direct that the trial of the issues of fact be proceeded with."

The case was decided on demurrer, and it does not appear in what form the learned Judge contemplated that the grant should be made. The question as to the form of the grant arose in the case of *In the Goods of Amelia Price* (1). In that case there was an application to grant probate of the will of a married woman, not made in the execution of a power, by which she bequeathed all her real and personal estate to her daughter and appointed executors. Her estate consisted partly of a reversion which was her separate estate and partly of stocks standing in her name. The will was dated the 5th of February, 1885, and the executors applied to the registry for a general grant. "This," says Mr. Justice *Butt*, in the course of his judgment, "was refused as contrary to the prevailing practice. Thereupon application was made to me by motion to direct a grant to issue without the usual words, limiting it not only 'to such property as the testatrix had a right to dispose of,' but also 'to such property as she has disposed of by her will.' It was contended that since the *Married Women's Property Act*, 1882, no reason exists for limiting the grant. Although I understand the grounds on which the practice was based I have not been able to satisfy myself of its necessity even before the Act of 1882. Now, at all events since that Act, a married woman having full power to dispose of her separate estate, I think the limitation ought no longer to be insisted on. The policy of recent legislation having been to place a married woman, so far as her separate estate is concerned, in the position of a *feme sole*, I direct probate to issue as prayed;" and he stated that the President of the Probate Division approved of this course being taken. [His Lordship then read the Probate Rules of March, 1887, rules 15, 18, and continued:—] "The probate in the present case has been granted in this form. Such being the law

(1) 12 P. D. 137, 138.

and practice as regards the grant of probate and letters of administration, it is next to be considered who was entitled beneficially to so much of the married woman's separate property as was not effectually disposed of by her will. In *Fettiplace* v. *Gorges* (1) the Lord Chancellor, after laying down that as an incident to her separate estate in personal property, a married woman has a right to dispose of it, goes on to say (2): "If no disposition, the husband succeeds as next of kin, not in consequence of the marital rights." By using this language I understand the Lord Chancellor to express his adherence to a view which would seem to have been adopted by some authorities as to the nature of the husband's title to succeed to property as to which the wife may die intestate, viz. that such title is derived under the statute of 31 Edw. 3, on the ground of his being "the next and most lawful friend" of his wife: see *Williams'* Executors (3). However this may be, the course of subsequent decisions has been uniformly in favour of the husband, but in more recent cases the law has been generally stated to be that (in the absence of express provision to the contrary) the quality of separate property ceases on the death of the married woman, and that thereupon her undisposed of property devolves just as if the separate use had never existed: see *Proudley* v. *Fielder* (4); *Molony* v. *Kennedy* (5). In *Cooper* v. *Macdonald* (6) Sir *G. Jessel*, M.R., puts it thus (7): "The separate use, if I may say so, is exhausted when the wife has died without making a disposition. She enjoyed the income during her life, and she has not thought fit to exercise that which was an incident of her separate estate, the right of disposing of her property. Why should equity interfere further with the devolution of the estate?" Upon this view of the law the title of the husband is clear. So far as the property is undisposed of the quality of separate property ceases on the wife's death, and consequently the right of the husband accrues just as if the separate use had never existed. If the undisposed of property consists of *choses in action*, the equitable interest of the

(1) 1 Ves. 46.
(2) Ibid. 49.
(3) Part I., Book 5, Chap. II., s. 1.
(4) 2 My. & K. 57.
(5) 10 Sim. 254.
(6) 7 Ch. D. 288.
(7) 7 Ch. D. 296.

STIRLING, J. husband vests on the death of the wife; and if the Ecclesiastical Court or Probate Court had held (as the present learned Judges of the Probate Division appear to think that those Courts ought to have held) that probate of the will of a married woman dealing with her separate estate should be granted to the executor in a general and not in a limited form, still the executor would be trustee for the husband of any of such separate property not effectually disposed of, just as in the cases of *Humphrey* v. *Bullen* (1) and *Elliot* v. *Collier* (2) the administrator of the wife was held to be trustee for the husband's legal personal representative.

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I apprehend, therefore, that if the *Married Women's Property Act*, 1882, had never passed, the title of the husband in the present case must upon the authorities have prevailed. It remains to be considered whether that statute has made any alteration in this respect.

The enactment relied on is contained in sect. 1, sub-sect. 1, of the Act, which provides that "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee."

It was strenuously contended before me that the appointment of executors in the present case was a disposition by Mrs. *Lambert* of her separate estate in favour of her executors, to the benefit of which they themselves, prior to the 11 Geo. 4 & 1 Wm. 4, c. 40, would have been and the next of kin are since the passing of that Act entitled.

If this argument be well founded a great anomaly will have been introduced into the law. The title of the next of kin is made to rest entirely on the appointment of an executor; so that if the testatrix had omitted to appoint an executor, but had made her will in all other respects in precisely the same manner, the devolution of her undisposed of separate estate would have been different.

Further, as I have already pointed out, the power of a married woman to dispose by will of her separate estate (being personalty) has been treated as settled throughout the present century; and

(1) 1 Atk. 458. (2) 3 Atk. 526; 1 Ves. Sen. 15.

if this contention were sound it ought (as it seems to me) to have prevailed with reference to all wills of married women entitled to separate estate which contained the appointment of executors. Nevertheless, according to the course of decisions of Courts of Equity, and the practice of the Ecclesiastical Courts, and of the Court of Probate, the title of the husband to the undisposed of personalty of the wife has uniformly prevailed. I am of opinion, therefore, that I cannot give effect to this argument, and that what I have really to consider is whether the *Married Women's Property Act* has altered the devolution of the undisposed of estate of married women.

The Act simply confers on married women the capacity to acquire, to hold and dispose of by will or otherwise of property as if they were *femes sole*. None of these matters are in question. The acquisition and holding of the property are past and gone. The dispute is as to the devolution of property undisposed of. Now with this the Act does not purport to deal.

In this respect the language of the Act is in marked contrast with that of the 25th section of 20 & 21 Vict. c. 85, which provides:—[His Lordship then read that section and continued:—]

Under these circumstances I see no reason for holding that the Act does more than it purports to do; and I am therefore of opinion that on the death of the testatrix the title of her husband to her undisposed of separate estate accrued; that the executors of her will became trustees of it for him, and consequently that he, and not the next of kin of the testatrix, is entitled to it.

As to the incidence of the probate duty, there being no express disposition of the residuary estate, it follows that such duty must be apportioned rateably between the specifically appointed property and the undisposed of property which has come to the husband, so as to fall on these properties respectively in the same manner as it would have done before the change which has taken place in the form of the grant.

Jenkins asked the Court to allow him to refer to *Blaiklock* v. *Grindle* (1), where a testatrix by her will attempted to appoint three different funds, and failed effectually to appoint two of

(1) Law Rep. 7 Eq. 215.

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them, and the grant of probate was limited to the fund which was effectually appointed, and it was held that the debts, funeral and testamentary expenses of the testatrix, and the costs of all parties must come out of the undisposed of residue.

STIRLING, J.:—I do not understand that in that case the probate duty upon the property which passed by the will was paid out of the undisposed of residue. It must have been paid before there was any distribution of the fund under the will, and I do not think this point arose in that case. In this case the undisposed of residue must bear the debts of the wife if there are any, and such part of the expenses of proving the will, including the probate duty, as is attributable thereto, and the appointed share will bear such part of those expenses as are attributable to it, but the expenses relating to the questions which have arisen here will fall on the undisposed of property, as they have been occasioned by a contest between the husband and the next of kin.

Solicitors: *Ramsden & Austin.*

W. W. K.

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[1886 K. 1073.]

Mortgage—Covenant by Mortgagors to pay Principal and Interest—Assignment by Mortgagors of Equity of Redemption—Further Charge by Assignee in favour of Original Mortgagees—Insolvency of Assignee—Action by Mortgagees on Covenant by original Mortgagors—Right of original Mortgagors to Reconveyance on Payment of original Mortgage Debt.

A mortgagor who has absolutely assigned his equity of redemption in the mortgaged property, acquires, when sued by the mortgagee upon the covenant to pay principal and interest contained in the mortgage, a new right to redeem, and is entitled upon paying the mortgage money to a reconveyance to himself, subject to any equity of redemption vested in any other person.

And he is so entitled, even if after the assignment of the equity of redemption the assignee has further charged the property either to the original mortgagee or to some other person.

In 1870 the Defendants mortgaged property to the Plaintiffs to secure £12,000 and interest, and entered into the usual covenants for payment of principal and interest.

In 1872 the Defendants, for value, absolutely assigned their equity of

redemption to *A. B.*, and he covenanted to indemnify them against the £12,000 and interest.

In 1875 *A. B.* further charged the property to the Plaintiff to secure £8000 and interest, covenanting that it should not be redeemable except upon payment of the £8000 as well as the £12,000.

A. B. afterwards became insolvent, and the property having depreciated in value, the Plaintiffs brought an action against the Defendants on the covenant contained in the mortgage of 1870, to recover the £12,000 and interest.

In a special case stated in the action:—

Held, that the Plaintiffs were entitled to judgment for the £12,000 and interest, but only upon the terms that they reconveyed the property to the Defendants subject to such equity of redemption as might be subsisting in any person or persons other than the Defendants themselves.

SPECIAL CASE.

By indenture dated the 4th of January, 1870, the Defendants, Messrs. *Trollope*, mortgaged certain leasehold property, consisting of a messuage stabling and buildings known as No. 11, *Hereford Gardens*, in the county of *Middlesex*, to the then trustees of the *Provident Life Office* to secure the sum of £12,000, and interest; and the mortgage deed contained the usual covenants by the mortgagors for the payment of principal and interest, and a proviso for redemption in the usual form. In 1872 the Defendants sold the equity of redemption in the mortgaged premises to *George Frederick*, Earl of *Glasgow*, for £9100, and by indenture dated the 24th of June, 1872, assigned the same to him subject to the indenture of mortgage of the 4th of January, 1870, and to the principal and interest thereby secured; and Lord *Glasgow* covenanted with the Defendants to pay the principal sum of £12,000 and interest, and to indemnify them from all claims in respect thereof. By indenture dated the 10th of May, 1875, Lord *Glasgow* further charged the premises comprised in the indenture of mortgage of the 4th of January, 1870, with the payment to the then trustees of the *Provident Life Office* of the sum of £8000 then lent by them, and interest thereon, and covenanted with them that the mortgaged premises should not be redeemable except upon payment of the £8000 and interest as well as the £12,000 and interest.

In 1886 Lord *Glasgow*, who had up to that time paid the interest on both mortgage debts, became insolvent, and the interest

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on the mortgage money having fallen into arrear, and the property having depreciated in value, the Plaintiffs, who were the present trustees of the *Provident Life Office*, applied to the Defendants to pay the £12,000 and interest under the covenant in the original mortgage. The Defendants were willing to pay the £12,000 and interest, but upon condition that Plaintiffs assigned to them the mortgage of the 4th of January, 1870, or otherwise assured to them the property comprised therein as security for the £12,000, in priority to the Plaintiffs' charge for £8000 created by the indenture of the 18th of May, 1875.

The Plaintiffs refused these conditions and brought an action against the Defendants upon the covenant contained in the original mortgage of the 4th of January, 1870, for payment of the £12,000 and interest. This was a special case stated in that action for the opinion of the Court upon the question whether the Plaintiffs were entitled to judgment for the sum of £12,000 and interest, and if so upon what terms.

Hastings, Q.C., and *Frank Evans*, for the Plaintiffs:—

The Plaintiffs are entitled unconditionally to a judgment for £12,000, interest and costs; and the Defendants are not entitled to a transfer of the mortgage of the 4th of January, 1870, or to an assurance or redemption of the property comprised therein, or to any stay of proceedings in this action, unless they pay the £8000 and interest secured by the mortgage of the 10th of May, 1875, as well as the £12,000 and interest secured by that of the 4th of January, 1870. They have absolutely assigned for value their equity of redemption, and they have ceased to have any interest whatever in the mortgaged property. They would not be necessary parties to a foreclosure action, and unless they have an interest in the equity of redemption they are not entitled to redeem: *Brown* v. *Stead* (1); *Pearce* v. *Morris* (2).

The Defendants are, of course, entitled to be indemnified against payment of the mortgage debt by the assignee of the equity of redemption; but if they wish to redeem the property, they must acquire an interest in the equity of redemption, for at present they have none.

(1) 5 Sim. 535. (2) Law Rep. 5 Ch. 227.

They are bound to repay us the £12,000 we lent them, with interest and costs; and we are entitled to tack the sums of £12,000 and £8000 and the interest and securities for the same, and to refuse to transfer the mortgage or assure the premises, except on full payment of all sums secured by both our mortgages.

The Defendants by assigning the equity of redemption to Lord *Glasgow* gave him the power and the right of dealing with the property as he thought fit, and when he further charged it he made it irredeemable except on payment of both the sums secured upon it; and the Defendants are bound by his acts.

It is clear that if the second advance had been by separate mortgagees, the Defendants would not, upon payment of the money due on the first mortgage, have been entitled to call for a reconveyance from the Plaintiffs: *Teevan* v. *Smith* (1); and in any case the Plaintiffs cannot be in a worse position than if they were second mortgagees: *Perry* v. *Barker* (2); *Dyson* v. *Morris* (3).

Buckley, Q.C., *Horsbrugh*, and *Napier Trollope*, for the Defendants:—

The argument for the Plaintiffs is that the Defendants have no right to redeem because they have parted with the equity of redemption. The answer is, that this is not an action by a mortgagor for redemption, but an action against a mortgagor upon his covenant to pay, which action opens his right to redeem, and entitles him to a stay of proceedings until the mortgagee gives him back unaltered the property which formed the security for the loan: *Palmer* v. *Hendrie* (4); *Schoole* v. *Sall* (5); *Lockhart* v. *Hardy* (6).

It is no doubt perfectly competent for a person who acquires the equity of redemption to borrow money on the property and to create a further incumbrance on it in favour of the original mortgagee, but directly the latter sues the original mortgagor upon his covenant to pay he calls into life rights which did not previously exist; and the original mortgagor can claim to hold the estate in effect as first mortgagee to the extent of the sum

(1) 20 Ch. D. 724.
(2) 13 Ves. 198.
(3) 1 Hare, 413.
(4) 27 Beav. 349; 28 Beav. 341, 343.
(5) 1 Sch. & Lef. 176.
(6) 9 Beav. 349.

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which he is called upon to pay under his covenant. The obligations between mortgagor and mortgagee are in fact mutual. Upon the mortgagor there is the obligation to pay, but directly he does so there arises in the mortgagee the obligation to give back the property which was the security for the money so paid. So that the right of the mortgagee to payment is not absolute, but controlled by that obligation on his part.

If a mortgagee who has obtained an assignment of the equity of redemption so deals with the mortgaged property as to put it out of his power to reconvey it, the original mortgagor is entitled to an injunction to restrain an action against him on his covenant to pay the mortgage debt: *Walker* v. *Jones* (1); *Rudge* v. *Richens* (2).

In this case if the Defendants pay on their covenant they will be entitled to hold the estate to the extent of £12,000 free from incumbrances. There will no doubt be another incumbrance of £8000 standing behind them, and the Defendants will be content to be redeemed upon payment of their £12,000 with interest and costs. But the Plaintiffs are not entitled to judgment except on those terms.

They contend, indeed, that they are entitled as against the Defendants to require payment of the £8000 also before they reconvey, and they call this "tacking." But suppose the further charge had been made to a stranger, it could not surely be maintained that the effect of the payment of the original mortgage-money by the Defendants would be to accelerate the second mortgage and make the stranger first mortgagee; and yet this is by analogy the result which the Plaintiffs claim to be entitled to insist on.

Hastings, in reply:—

Even admitting that by suing a mortgagor who has parted with the equity of redemption the mortgagee lets him in to redeem—and whether that right of redemption is a fresh right created by the action or an old right revived by it is immaterial—and admitting also that a mortgagee who can no longer give effect to the mortgagor's right to redeem has lost the right to enforce

(1) Law Rep. 1 P. C. 50, 61. (2) Law Rep. 8 C. P. 358.

his covenant—still that is not the case here. The Plaintiffs can reconvey, and the real and only question is on what terms the Defendants are to be let in to redeem. Upon that we say that they are not entitled to redeem the first mortgage without also redeeming the second.

In *Palmer* v. *Hendrie* (1) the mortgagee had concurred with the owner of the equity of redemption in selling a portion of the mortgaged property, and the mortgagor's right to redeem could not be worked out. And that this is the true ground of that decision is shewn by *Lockhart* v. *Hardy* (2). In these and all the cases cited for the Defendants there was a single mortgage only. Here there are two successive mortgages, and the original mortgagor has only the same right of redemption as any other mortgagor: *Teevan* v. *Smith* (3). It makes no difference whether the first and second mortgages are vested in the same person or not. They are two existing incumbrances, and the mortgagor is not entitled to redeem one without the other, otherwise he would be in the position of a special mortgagor to himself, for which there is no authority. It has never been decided that where the mortgagor has assigned the equity of redemption for value, and his assignee has created a second mortgage, the original mortgagor is, on paying the original mortgage-money, entitled to redeem the first mortgage without redeeming the second.

STIRLING, J.:—

So far as I am aware there is no authority precisely governing this exact question, and, having regard to the nicety of the point involved, I shall reserve my judgment.

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This is a special case raising a question which does not appear to be entirely covered by any previous decision. The facts which give rise to it are few and simple, and may be thus stated. [His Lordship then stated shortly the facts of the case, and continued:—] Although at law the covenant for payment of the mortgage debt contained in a mortgage deed may be absolute,

(1) 27 Beav. 349; 28 Beav. 341.
(2) 9 Beav. 349.
(3) 20 Ch. D. 724.

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and the estate of the mortgagee may become absolute on non-payment at the time appointed, it has long been established that the case is otherwise in equity. "It is also clear," said Lord Justice *Turner* in *Walker* v. *Jones* (1), "that every mortgagor has the right to have a re-conveyance of the mortgaged property upon payment of the money due upon the mortgage; and that every mortgagee is charged with the duty of making such re-conveyance upon such payment being made." If the mortgagee, although unable to perform this duty, insisted on suing the mortgagor at law on his covenant, the Courts of Equity interfered in the mortgagor's favour. Thus in a case mentioned by Lord *Redesdale* in *Schoole* v. *Sall* (2), where the mortgagee died leaving no heir, and his legal personal representative sued at law for the mortgage debt, an injunction was granted to prevent the prosecution of the action upon the terms of the mortgage debt being brought into Court, where it remained until the legal estate was got in and conveyed to the mortgagor. Again, where a mortgagee has obtained a decree for foreclosure absolute he may still sue the mortgagor on the covenant provided he retains the mortgaged property in his possession, but (as is laid down by Lord *Langdale* in *Lockhart* v. *Hardy* (3)), by so suing he gives the mortgagor a new right of redemption, notwithstanding the foreclosure, and the mortgagor may file a bill to redeem. If, however, the mortgagee has sold the mortgaged property, a Court of Equity will interfere to restrain an action on the covenant. In these cases the mortgaged property had ceased to be vested in the person who insisted on his legal rights under the covenant to pay.

I have now to inquire how the law stands where the mortgagor has parted with his interest in the mortgaged property. If, for example, the mortgagor has assigned absolutely his equity of redemption in the mortgaged property it was conceded in argument that so long as the mortgagee abstained from suing, the mortgagor cannot bring an action to redeem; and, further, that if the mortgagee chooses to assert his right to foreclose, the mortgagor is not a necessary party to the foreclosure action. If,

(1) Law Rep. 1 P. C. 61. (2) 1 Sch. & Lef. 176.
(3) 9 Beav. 355.

however, the mortgagee sues the mortgagor on his covenant the case of *Palmer* v. *Hendrie* (1) shews that the mortgagor having paid what is due on the mortgage is in some way or other entitled to require the mortgagee to perform the duty of reconveying the mortgaged property.

In that case the facts were these: *Palmer*, the plaintiff, in 1847 mortgaged some leasehold property to *Hendrie* for £800, and he covenanted in the usual terms to pay the mortgage money. After part of it had been paid off, *Palmer* agreed to transfer the equity of redemption to *Overton & Hughes*, who were solicitors. Accordingly, by an indenture, dated in February, 1850, *Palmer* assigned the property to them, subject to the mortgage, and *Overton & Hughes* covenanted to pay the mortgage and to indemnify the plaintiff therefrom. After this *Hendrie* executed certain deeds by which he and *Overton & Hughes* granted underleases of part of the property at peppercorn rents, and by these transactions considerable sums by way of premium were received and retained by *Hughes*. *Overton's* interest in the mortgaged property was transferred to *Hughes*, who, in 1858, absconded, and was declared bankrupt.

In January, 1859, the executors of *Hendrie* commenced an action at law against *Palmer* upon his covenant to recover £300, alleged to be due on the mortgage. *Palmer* then filed a bill against the executors, submitting that in equity he had been relieved from all liability upon the covenant for payment of the mortgage money contained in the deed of 1847.

The Master of the Rolls, on a motion for an injunction in the action, says this (2): "I think that this case does not depend upon the state of the accounts between the defendant and *Overton & Hughes*, or upon the doctrine of principal and surety. I am of opinion that there can be no question as to the relative rights and obligations of a mortgagor and mortgagee. A mortgagee may pursue all his remedies at once; he may bring actions of covenant and ejectment, and at the same time proceed to foreclose the mortgage. If he forecloses it, and afterwards sues on the covenant, he thereby opens the foreclosure; but if he sues on the covenant and does not get fully paid, he may still go on

(1) 27 Beav. 349; 28 Beav. 341. (2) 27 Beav. 350.

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and foreclose the mortgage. But after he has once been paid in full, under the covenant he cannot touch the estate, and is precluded from all proceedings afterwards. These then are the relative duties and reciprocal obligations between mortgagor and mortgagee. The mortgagee has a right to make use of all his remedies against the mortgagor for obtaining payment of his money; but as soon as the mortgage money has been fully paid, he is bound to deliver over the mortgaged estate to the mortgagor." Then he goes on: "The question is, whether, when the mortgagee has made it impossible to restore the property mortgaged, he can proceed against the mortgagor to recover the amount of the mortgage money. He can, undoubtedly, at law, sue upon the covenant . . . but the mortgagees must perform their reciprocal obligation: they are bound, on payment, to restore the property to the mortgagor, and if it appear, from the state of the transaction, that, by the act of the mortgagee, unauthorized by the mortgagor, it has become impossible to restore the estate on payment of all that is due, I am of opinion that this Court will interfere and prevent the mortgagee suing the mortgagor at law. Suppose a mortgagee has conveyed away the property without receiving any consideration for it, can he afterwards sue the covenantor, who, on his part, is unable to redeem the property, there being none left to redeem? What is there in this case to take away the plaintiff's right to redeem the property or his right to compel the defendants to restore it on being paid? I see nothing in the case to do it. It is argued that by the conveyance of the equity of redemption the plaintiff is precluded, under any circumstances, from calling for a conveyance of the estate. But it is to be observed, that the transferees became liable to pay the mortgage money, and that they covenanted to indemnify the plaintiff therefrom. *Hendrie* was no party to the deed, and his executors insist that it was not binding on them, and that they have a right to sue the plaintiff on the covenant in the mortgage deed. But he has since admitted the transaction, and granted leases of the property at nominal rents, and has either received the purchase-money for the leases or has allowed *Overton & Hughes* to do so. I think his executors cannot now repudiate the transfer, and avail themselves of it, for the purpose of

saying, on the one hand, that it relieves them from their obligation to restore the estate, and on the other, that they can still sue for the mortgage money."

At the hearing (1) Lord *Romilly* adhered to this decision, which was approved by Lord Justice *Turner* in *Walker* v. *Jones* (2). It follows from this decision that a mortgagor who has absolutely assigned his equity of redemption is nevertheless when sued on his covenant entitled, upon paying the mortgage money, to a reconveyance to himself; for if the reconveyance had only to be made to the assignee of the mortgagor, and not to the mortgagor himself, then the dealings of the mortgagee and of the assignee with the mortgaged property could not have affected the mortgagor, and ought not to have prevented the mortgagee from suing him. In other words, the assignment of the equity of redemption did not render absolute a covenant on the part of the mortgagor, which had previously been (in equity) conditional only.

I think, therefore, that a mortgagor who has entirely parted with the equity of redemption nevertheless acquires upon being sued by the mortgagee a new right to redeem, in the same way as a mortgagor who has been absolutely foreclosed acquires upon being sued a new right of redemption; and upon redeeming the mortgagor would be entitled, as I apprehend, to a reconveyance in the form indicated in *Pearce* v. *Morris* (3)—namely, subject to such equity of redemption as may be vested in any person other than himself.

Then, does it make any difference if, after the assignment of the equity of redemption, the assignee mortgages either to the original mortgagee or to some other person? I think not.

Such a mortgage creates in the new mortgagee a fresh interest in the equity of redemption, but it does not, in my opinion, impose any additional burden or liability on the mortgagor.

On this part of the case *Palmer* v. *Hendrie* (4) again throws some light. It was there held that the mortgagor on paying off the mortgage debt is entitled to have the property restored to him unaffected by any acts of the mortgagee unauthorized by the

(1) 28 Beav. 341.
(2) Law Rep. 1 P. C. 50, 62.
(3) Law Rep. 5 Ch. 277.
(4) 27 Beav. 349; 28 Beav. 341.

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mortgagor. The necessary authority might be derived either (as in the case of *Rudge* v. *Richens* (1)) from the powers conferred by the mortgage deed, or from the direct concurrence of the mortgagor, or possibly otherwise; but it was held in *Palmer* v. *Hendrie* (2) that the mere concurrence of the assignee of the equity of redemption in acts which were not within the powers conferred by the mortgage was insufficient. It was argued in the present case that by absolutely assigning the equity of redemption the mortgagor authorized the assignee to deal with it as his own property, and consequently to raise money on it. If this argument be well founded, I have difficulty in seeing why the dealings which formed the subject of decision in *Palmer* v. *Hendrie* should not have been held to be authorized by the mortgagor. Such authority as was conferred by the assignment did not, in my judgment, extend to raising money on behalf of the mortgagor, or to making his right of redemption more burdensome to him than it would otherwise have been. The assignee could only raise money on his own behalf, and could not by so doing impose (as against the mortgagor) an additional burden on the mortgaged property.

Again, it was contended that the case was governed by that of *Teevan* v. *Smith* (3). But, to my mind, the decision in *Teevan* v. *Smith* depended on facts and principles totally different from those with which I am now dealing. There a mortgagor having made first and second mortgages, tendered to the first mortgagee the amount due on his mortgage, and then claimed under sect. 15 of the *Conveyancing Act* a transfer to his own nominee of the mortgage debt and security. It was held that he was not entitled to do so, to the prejudice of the second mortgagee. If, in the present case, the second mortgage had been executed by the Defendants, the case of *Teevan* v. *Smith* and the principles on which it was decided might have had some application: but the second mortgage is the mortgage of Lord *Glasgow*, and the Defendants are under no liability in respect of it.

I am, therefore, of opinion that the Plaintiffs are entitled to judgment for £12,000 and interest, but only on the terms that

(1) Law Rep. 8 C. P. 358. (2) 27 Beav. 349; 28 Beav. 341.
(3) 20 Ch. D. 724.

upon receiving payment of that sum they reconvey the mortgaged property to the Defendants, subject to such equity of redemption as may be subsisting in any person or persons other than the Defendants themselves.

STIRLING, J.

1888

KINNAIRD v. TROLLOPE.

Solicitors: *Burrows, Barnes, & Pears; Trollope & Winckworth.*

W. W. K.

KEKEWICH, J.

1888

April 20, 21, 23.

WHELAN *v.* PALMER.

[1887 W. 901.]

Power of jointuring—Corrupt Bargain inducing Appointment—Fraud on Power—Escrow.

Under a power of appointing a jointure rent-charge not exceeding £200, the donee of the power appointed £200 a year to the jointress under a corrupt bargain with her to provide thereout for a stranger:—

Held, that the appointment was a fraud on the power and void not merely *pro tanto* but altogether, although the jointress took some benefit under the appointment, it clearly appearing that the donee had no intention whatever of benefiting her and used the power merely as machinery to benefit the stranger.

If, however, it had appeared that the donee did intend to benefit the jointress to some extent the appointment might have been upheld *pro tanto*.

The doctrine laid down by Lord *St. Leonards* in his book on Powers (1), and adopted in *Rowley* v. *Rowley* (2), that there is a distinction between a power of jointuring and a power to appoint to children, discussed.

W. C. WHELAN by his will, dated the 17th of February, 1858, after appointing *J. R. Planché* and *J. T. Jackson* (both since deceased) and the Defendant *W. M. Fladgate* his trustees and executors, devised all his real estates to the said trustees for 1000 years from the date of his decease upon trust to secure certain annuities; and, subject thereto, to the use of his wife *K. F. Whelan* during widowhood, and after her death or second marriage the testator devised his said real estate (in the events which happened) to his son *W. H. C. Whelan* for life, with remainder to his issue male in tail male, with remainder to his (the testator's) daughter, the Defendant *J. E. Palmer*, the wife of the Defendant *J. D. Palmer*, for life, with remainder to her son the Defendant *V. D. Palmer* in tail male, but subject to a limitation in immediate precedence of the life estate of the Defendant *J. E. Palmer* to the Defendant *R. G. Clarke* for 100 years upon trust to pay the rents and profits to the Defendant *J. E. Palmer* for her separate use, without power of anticipation, with divers remainders over. And the said testator by his said will empowered every male person tenant for life under the limitations thereof,

(1) 8th Ed., pp. 610–612. (2) Kay, 242, 259, 260.

in contemplation of or after marriage, by deed or will to appoint in favour of any woman whom he might marry or have married a yearly rent-charge not exceeding £200 to be issuing out of his said estates or any part thereof, and to commence from the death of each tenant for life and be payable half-yearly during the life of such woman, with such powers and remedies for securing the payment thereof as therein mentioned.

The said testator died on the 3rd of June, 1869, and his widow, the said *K. F. Whelan*, married again on the 5th of January, 1885, and thereupon the said *W. H. C. Whelan* became tenant for life of the settled estates.

W. H. C. Whelan married the Plaintiff on the 18th of January, 1877, and by deed-poll under his hand and seal dated the 23rd of April, 1886, and duly made in exercise of the aforesaid power of jointuring, appointed in favour of the Plaintiff as from the date of his decease a yearly rent-charge of £200 a year to be issuing out of the said estates and to be payable half-yearly during the Plaintiff's life, with the usual remedies by distress and entry by law allowed for securing payment thereof.

W. H. C. Whelan died on the 26th of April, 1886, without leaving any issue by the Plaintiff, and thereupon the Defendant *J. E. Palmer* became tenant for life of the settled estates. The Defendant *J. E. Palmer* having declined to pay the aforesaid rent-charge of £200 on the ground that the deed-poll was void and of no effect, the Plaintiff commenced this action, and by her statement of claim (after stating the above facts) alleged that prior to the date of the deed-poll and in contemplation thereof she at the request of *W. H. C. Whelan* agreed with him that in the event of his appointing to her a rent-charge of £200 per annum by way of jointure under the aforesaid power, she would assign thereout to one *Elizabeth Thompson* the annual sum of £60; and that after the death of *W. H. C. Whelan* she was advised that the appointment of the said rent-charge was to the extent of £60 per annum invalid as being a fraud on the aforesaid power of jointuring, but the same was valid to the extent of £140 per annum, and she claimed a declaration that under the aforesaid deed-poll she was entitled to a rent-charge of £140 per annum issuing out of the said settled estates, and consequential relief.

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The Defendants, the *Palmers*, by their joint statement of defence did not admit the execution of the deed-poll, and alleged that if it was executed the sole cause and inducement for its execution was the agreement between *W. H. C. Whelan* and the Plaintiff in favour of *Elizabeth Thompson*; and further, that if it was executed, it was executed as an escrow to take effect on conditions which were never fulfilled. Issue was joined and this was the trial of the action.

It appeared from the evidence that the Plaintiff and her husband, *W. H. C. Whelan*, had lived apart for several years prior to his death; that in February, 1886, he made a will leaving his property in trust for *Elizabeth Thompson* (with whom he was living) and his daughter by her; and that by a codicil to the will he revoked a previous will by which he had exercised the power of jointuring in favour of the Plaintiff. It also appeared that shortly before his death he was most anxious to provide for *Elizabeth Thompson*, and proposed in the first instance to the Defendant *J. E. Palmer* that if she would bind herself to pay £100 per annum to *Eliabeth Thompson* he would bind himself not to exercise his power of jointuring, but the negotiation fell through; that then he approached his wife, the Plaintiff, through his solicitor, Mr. *Collings*, on the same subject, and eventually on the 19th of April, 1886, she signed an agreement whereby in consideration of his irrevocably appointing to her £200 a year under his power of jointuring she agreed forthwith to assign or secure £60 a year to *Elizabeth Thompson*. On this he executed the deed of the 23rd of April, 1886, which he sent to Mr. *Collings* with instructions not to hand it over to the Plaintiff until she fulfilled her part of the agreement, and that Mr. *Collings* still held the deed.

Barber, Q.C., and *R. J. Parker*, for the Plaintiff:—

No doubt if this were a case of the exercise of a power of appointment among children it would be bad altogether, but the cases shew that there is a distinction between such powers and powers of jointuring. In the latter case the Court will sever the appointment, and hold it to be good, so far as it is for the benefit of the jointress, and bad as to the rest: *Lane* v. *Page* (1); *Aleyn*

(1) Amb. 233.

v. *Belchier* (1); *Daubeny* v. *Cockburn* (2); *Baldwin* v. *Roche* (3); *Rowley* v. *Rowley* (4); *Sugden* on Powers (5). This appointment therefore is good as to the £140 per annum intended for the Plaintiff, but bad as to the £60 intended for *Elizabeth Thompson*. There is no fraud on the remaindermen, because they take the property subject to the power of jointuring, and therefore they cannot complain of its exercise in favour of the Plaintiff so far as it is for her own benefit.

Warmington, Q.C., and *A. Young*, for the Defendants, the *Palmers*:—

The suggestion that there is a distinction between powers of appointing to children and powers of jointuring is only a proposition in text-writers, and is not supported by the cases cited when considered. There is no judicial decision on the point.

[KEKEWICH, J.:—In *Rowley* v. *Rowley* (6), Vice-Chancellor *Wood* refers to the doctrine laid down by Lord *St. Leonards* in the 7th edition of his book on Powers, that there is a distinction between a power of jointuring and a power of appointing to children, and after pointing out that the doctrine is open to the objection taken by Sir *William Grant* in *Daubeny* v. *Cockburn* (7), adds "it is now too late to have that principle as to jointures changed." After that statement of his views, and after so many years, it is not open to me to hold otherwise.]

With all deference the Vice-Chancellor might have omitted the whole passage. It is purely *obiter dictum*. The case before him was one, not of jointuring, but of children's portions. In all the cases cited there was a clear intention to benefit the wife to some extent, and the appointment was several—so much to the wife and so much to the stranger. Here there is an absolute appointment of the whole fund subject to a corrupt bargain. The first and only object was, not to benefit the wife, but to provide for *Elizabeth Thompson*, and the power was used solely to effect that object. The deed of appointment was also executed as an

(1) 1 Eden. 132.
(2) 1 Mer. 626.
(3) 5 Ir. Eq. Rep. 110.
(4) Kay, 242, 260.
(5) 8th Ed., pp. 609–612.
(6) Kay, 259, 260.
(7) 1 Mer. 637, 643.

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escrow. It was not to be operative until the whole transaction was complete. The Plaintiff has refused to carry out her part of the bargain, to fulfil the condition on which the deed was executed, and the Court will not uphold the appointment: *Sugden* on Powers (1); *Digges' Case* (2); *Wigson* v. *Garret* (3); *Kibbet* v. *Lee* (4); *Earl of Leicester's Case* (5). Lastly, a power of jointuring is a particular power given for a particular object, and if it be exercised for the particular object so as to foist in and confer a benefit upon a stranger, that is a fraud on the settlor and on the remainderman.

Farwell, for the Defendant trustees.

Barber, in reply:—

The appointment so far as it goes was not a fraud on the settlor or appointor. The Court will not consider the motives of the appointor, but the purpose for which the appointment was made, *Topham* v. *Duke of Portland* (6). The appointor did intend to give the Plaintiff £140 per annum, and he did so to secure £60 per annum for *Elizabeth Thompson*. The issue here is, whether the appointment as to £140 per annum is good or not. As to the deed being executed as an escrow, the Plaintiff has not fulfilled her part of the agreement under legal advice, but if the Court thinks the appointment cannot stand until the condition is performed, she is quite ready and willing to execute at once an assignment of £60 per annum in favour of *Elizabeth Thompson*.

KEKEWICH, J.:—

This is a case of peculiar interest to the legal profession, because it is more concerned with the discussion of principles of law than with anything else. It is peculiar also in this sense, that it raises a question which certainly has not been directly raised for many years, if ever.

The first point, and the only point, on which the case was launched was this, that although, according to the rules which

(1) 8th Ed., ch. vii., s. 9.
(2) 1 Rep. 173 a.
(3) Sir T. Raym. 239; 3 Keb. 510.
(4) Hob. 312.
(5) 1 Vent. 278.
(6) 1 D. J. & S. 517.

govern the Court in dealing with appointments under powers, this appointment in favour of Mrs. *Whelan*, the Plaintiff, could not stand; yet there was an exception in favour of an appointment to a wife in exercise of a power of jointuring. That position was rested, as the statement of claim is rested, on what is stated by Lord *St. Leonards* in his work on Powers, and on the quotation of his opinion by Vice-Chancellor *Wood* in *Rowley* v. *Rowley* (1). I have said what my opinion is about that in the course of the argument, but it will be convenient for me to repeat it now. With great respect to Lord *St. Leonards*, I am unable to understand how he arrived at the conclusion expressed in his book. It may be, and probably is, my own want of intelligence, but I do not follow the arguments on which he bases his conclusion. I do not understand that his conclusion does follow, or is expressed in, the cases to which he refers. But it is his conclusion, and it is the conclusion of one of the most eminent lawyers of this or any other generation, and it is expressed in that book which has always been accepted as an authority, distinguished perhaps above all other text-books current in the Courts. I might perhaps have felt at liberty to canvas his conclusion, expressed, as it is, to be founded on the cases, if the conclusion had rested entirely on his own *dictum* expressed in that book; but I find that conclusion stated by Vice-Chancellor *Wood* in the case of *Rowley* v. *Rowley* in perfectly plain terms. Quoting Lord *St. Leonards'* words, in a passage which, as I have already mentioned, twice comments on it as being open to the observation made by Sir *William Grant* in *Daubeny* v. *Cockburn* (2), Vice-Chancellor *Wood* in the conclusion of that passage quotes as coming from Lord *St. Leonards* the words, "It is now too late to have that principle as to jointures changed," and apparently it is with the intention, as I understand it, of making them his own. He does certainly quote them as governing him, and I think notwithstanding that he does not approve of them. He certainly indicates an opinion that if it had not been for the authority of Lord *St. Leonards* he should have doubted the proposition. Now, it has been urged before me that I ought to disregard that, and if it were a recent authority I might be disposed to do so, but that judgment was

(1) Kay, 259. (2) 1 Mer. 637, 643.

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pronounced no less than thirty-four years ago, it has found its way into text-books, I cannot doubt but that numerous deeds have been executed on the faith of it, and I think it would be entirely contrary to the principles which govern Judges, and particularly Judges of first instance, if I were to allow my disposition to go into the principle of the matter to overcome my bounden duty to respect authority. I do not hesitate to say that I do not understand the principle, and I do not think it does follow from the cases cited, and in some way or other it seems to be a warping of the decision in *Lane* v. *Page* (1) to apply it to such a case as I have before me, but still I think it is safer, and I think it right, simply to say I am bound by that authority, and that if there is to be any departure from it, that departure must commence in a Court higher than my own.

The second point made is this, that this deed, purporting to exercise this power of jointuring in favour of Mrs. *Whelan*, the Plaintiff, was delivered as an escrow. On this point the evidence is conclusive. The deed was executed for the express purpose of securing a provision for Miss *Thompson*. Mr. *Whelan* was under a moral obligation to provide for her if he could, and he appears to recognise that obligation. He was in impecunious circumstances, that is to say, he had no property of his own out of which he could make that provision, and he bethought him, with the assistance of his solicitor, Mr. *Collings*, of making a provision by means of the power of jointuring. He had not the slightest intention of benefiting his wife; he had been separated from her for several years; he had at one time executed a will exercising the power in her favour; but that will had been revoked, and the intention of benefiting his wife was a thing of the past. He wished to exercise that power of jointuring, not in order to benefit the person for whom it was intended, but in order to benefit Miss *Thompson*. That being so it was attempted, with Mr. *Collings'* assistance, to do it one of two ways. His first idea was to make a bargain with the remainderman, that is to say, a bargain that the power of jointuring should not be exercised in consideration of the remainderman providing something for Miss *Thompson*. That was very nearly effected. At one time Mr. *Collings* must

(1) Amb. 233.

have hoped that that plan had altogether succeeded. However, there was some considerable doubt about it, and therefore he turned him in another direction. Then negotiations commenced which resulted in this deed—negotiations between the Plaintiff and Mrs. *Whelan* that if the power was exercised in her favour she would appoint £100, or, as she afterwards agreed, £60 a year to Miss *Thompson* out of it. I say distinctly out of it because, although those words do not appear in the agreement which Mrs. *Whelan*, the Plaintiff, executed, there can be no doubt that the intention was to provide £60 a year out of the £200 a year. The arrangement with the remainderman did fall through, and then this was pressed forward, Mr. *Whelan* being seriously ill and time being pressing. The deed was prepared by Mr. *Collings*. It was a simple deed of appointment in favour of Mrs. *Whelan*: it could not be anything else. It would have been very foolish to have prepared it in any other form. But there had been prepared, with Mrs. *Whelan's* entire concurrence and executed by her, an instrument by which she bound herself if this appointment was made in her favour to secure Miss *Thompson* £60 a year, and she knew perfectly well, as the fact undoubtedly was, that Mr. *Whelan* had not the slightest intention of giving her anything except on the terms of her securing Miss *Thompson* this £60 a year. Therefore one is by no means surprised to find that on the day immediately following the execution of the deed Mr. *Whelan* sent it to Mr. *Collings* with the instructions that he was not to deliver it over except on Mrs. *Whelan* executing the deed which she had promised to do by the agreement to which I have referred. In other words, so far as Mr. *Whelan* could do so, he made it a condition of the deed taking effect that Mrs. *Whelan* should first execute the deed in Miss *Thompson's* favour.

Now is that an escrow, or is it not? There are two authorities to which I will refer as stating what an escrow is. One is *Nash* v. *Flyn* (1), where Lord *St. Leonards* says: "I have always considered it as a clear point, that if the instrument be delivered upon condition, that constitutes it an escrow." The other case is that of *Kidner* v. *Keith* (2) where Mr. Justice *Williams*, a very eminent authority on points of this kind, says: "There is no doubt in

(1) 1 J. & Lat. 162, 175. (2) 15 C. B. (N. S.) 35, 43.

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point of law, that, where, by express declaration or from the circumstances, it appears that the delivery of a deed was not intended to be absolute, but that the deed was not to take effect until some contemplated event should have happened, the deed is not a complete and perfect deed until that event has happened." I have not the slightest doubt myself that here it does appear from the evidence and all the circumstances that the delivery of the deed was not intended to be absolute until a contemplated event should have happened, that is to say, until Mrs. *Whelan* should have made the provision in favour of Miss *Thompson* which she had undertaken to do. Therefore I should be prepared to decide the case, if there were nothing else in it, on the ground that this was an escrow, and never took effect, because Mrs. *Whelan* has declined to execute any deed confirming the £60 a year to Miss *Thompson*. But Mr. *Barber* has urged in reply that that is a condition which could now be performed, and that if she were now to execute the deed which she has bound herself to execute she could say "The condition has been fulfilled; it is no longer an escrow, the deed is now a complete deed, and therefore I stand on an entirely different footing." It would not be right of me to decide the hypothetical case, and particularly as it may possibly be the subject of litigation; but when, if ever, that occurs it will be worth consideration whether Mrs. *Whelan* can now fulfil a condition which, in anticipation of and during this litigation, she has declined to fulfil. It will be worth her consideration whether she must not be held to have elected to proceed by a refusal to execute that deed and whether it is possible for her now to go back. However, I do not intend to do more than suggest those points for her consideration. I think it would not be right to express a conclusive opinion on a point which cannot now be raised.

Then there is another point. It is said that this deed appointing the £200 a year to Mrs. *Whelan* is not really an execution of the power, that is to say, not such an execution as the Court will uphold. It is said to be a fraud on the power. That is one way of putting the point, but I prefer to consider whether it is an execution of the power at all. I know of no reason or any authority why a power of jointuring a wife should be regarded

as different from any other power with reference to the question whether it has been honestly exercised or not. I do not find myself here in the slightest degree hampered by what Lord *St. Leonards* has said in the passage to which I have before referred or the reference to that by Vice-Chancellor *Wood*. The question is, is it an honest exercise of the power, that is to say, an exercise intended for the purpose which the deed creating the power contemplated? The object of the power undoubtedly was to enable Mr. *Whelan* to jointure the wife, whether before marriage or afterwards, and the power is in the usual form as far as that is concerned. There is nothing to prevent his exercising the power after marriage, but it was for the purpose of jointuring the wife. It is said that to exercise it in any other way would be a fraud, that is to say, defeat the intention of the settlor. I am not sure that that is a happy way of putting the case. The settlor is gone, and I do not know that one can very well say that there is any fraud on him. What is more important is, that it may be a fraud in the sense of defeating the remaindermen who are intended to take, not the whole estate less £200 a year, but the whole estate less so much per annum as the tenant for life in exercising his power of jointuring charges on that estate. If he has not exercised his power of jointuring, then he has not taken anything out of the estate, and the remaindermen are entitled to the whole: and they are also entitled to it so far as he has not properly exercised his power of jointuring. Several cases were referred to which are quoted by Lord *St. Leonards* in his work on Powers, as laying down the rule about which I apprehend there is really no doubt. One is *The Earl of Leicester's Case* (1), which cites *Kibbet* v. *Lee* (2), and is therefore valuable as containing that quotation as a matter of authority, "that if a deed of revocation had been made" (in that case it was a deed of revocation), "and the party had declared it should not take place until £100 paid, there the operation of it would have been in suspense until the £100 paid, and then it would have been sufficient." And in harmony with that we find the second resolution in *Digges' Case* (3). There, again, it was a power

(1) 1 Vent. 278, 280.
(2) Hob. 312.
(3) 1 Rep. 173 b.

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of revocation: it was resolved that "where the revocation is to be made by deed indented to be enrolled, it is as much as to say 'by deed indented and enrolled,' for no revocation shall be in the same case until the deed be enrolled, for if it should be a revocation before the enrolment, then peradventure the deed would never be enrolled, which would be against the words and intents of the parties." I need not refer to other cases. They all support the same view. Here I hold on the evidence, without the slightest hesitation or doubt, that Mr. *Whelan* never would have given anything to his wife unless he had seen his way, through that gift, to benefit Miss *Thompson*; that it was a matter of bargain with his wife how much she was prepared to concede to Miss *Thompson*; and that that bargain was, "You give Miss *Thompson* £60 a year, and I will exercise my power in your favour of £200 a year." I have nothing to do with motives; they are a dangerous subject with which to treat at all. But I am entitled to look at the purpose, the intention, with which a deed is executed. That is the foundation of the judgment of Lord Justice *Turner* in *Topham* v. *Duke of Portland* (1), which is exhaustive of the whole of this branch of law. You look not at the motive, but at the intention. If you find that the intention or the purpose is fraudulent, that is to say, not honestly in exercise of the power, then you will set aside that exercise, because it is not honest, that is to say, not according to the intention of the parties. Now here I find that Mr. *Whelan* did not intend to benefit his wife, but intending to benefit Miss *Thompson* he used the power of jointuring merely as a machinery for benefiting Miss *Thompson*; finding he could not do that without benefiting his wife, he benefited her for that purpose and for no other. To hold that to be an exercise of the power would be to say that the power may be exercised for a purpose other than that for which it is intended. To hold that the deed executed by him is to have its effect notwithstanding that Mrs. *Whelan* has declined to give Miss *Thompson* her £60 a year, to my mind would be against the words and intent of the parties. Whether it is right to describe it as a "fraud on the power," a "fraud on the appointor," or a "fraud on the settlor," I think

(1) 1 D. J. & S. 517.

is immaterial. To my mind the honesty of the case is that it was never intended to be exercised at all, unless Miss *Thompson* got a benefit, that is to say, unless Mrs. *Whelan* did execute a deed conformable to her agreement; that that was not what the deed containing the power intended; and that therefore the exercise of the power cannot be upheld.

There is only one other point which I think I ought to mention, though it really is disposed of by what I have already said. Notwithstanding a contrary view in some cases, it has now been I think definitely settled, and particularly by that judgment of Lord Justice *Turner* in *Topham* v. *Duke of Portland* (1), that where you can see your way to sever the honest part from the dishonest part, using the words in the legal sense, that is to say, that which is legally right from that which is legally wrong, then you may give effect to that which is legally right, notwithstanding that you are obliged to avoid that which is legally wrong. Lord Justice *Turner* says that the general rule, that where an appointment is made for a bad purpose, the bad purpose affects the whole appointment (quoting from a decision of the Master of the Rolls, who relied upon *Topham* v. *Duke of Portland* in support of that view), is correct when applied to cases in which the evidence does not enable the Court to distinguish what is attributable to authorized from what is attributable to unauthorized purposes. I feel, no doubt, that if the evidence enables the Court to make this distinction, the foundation on which the rule rests—the impossibility of distinguishing what is attributable to one purpose from what is attributable to another—wholly fails, and the general rule therefore cannot, as it seems to me, apply. It is said that you can make the distinction here, that you can see that there was attributable to the authorized purpose £140 a year, and attributable to the unauthorized purpose £60 a year, and that, therefore, distinguishing between the two, you can give effect to that which was authorized, and deny the effect of that which was unauthorized. I think the answer to that is, not so much that you cannot make the distinction, but that you can go further on the other side, and say that here the appointment to the authorized purpose would never have existed but for the intention and

(1) 1 D. J. & S. 517.

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agreement that there should be an appointment to the unauthorized purpose. To my mind that is fatal to the Plaintiff's claim, and there must be judgment for the Defendants with costs.

Solicitors for Plaintiff: *Kime & Hammond.*
Solicitors for Defendants: *Flux, Son & Co.; Fladgate & Co.*

H. L. F.

KEKEWICH, J. 1888 *May* 3, 4.

WEBB *v.* JONAS.

[1887 W. 457.]

Settlement—Trust to invest on "Real Securities"—Contributory Mortgage of Freeholds—Breach of Trust.

In the absence of an express power, it is a breach of trust for trustees, having an ordinary power to invest on "real securities," to invest on a contributory mortgage of freeholds.

By a post-nuptial settlement, dated the 5th of October, 1852, and made between *G. Webb* and *Frances* his wife of the one part, and *S. Webb* and *W. B. Freeland* of the other part, a moiety of a sum of £1000 and of a sum of £750 £3 per cent. Consols, were assigned by the said *G. Webb* and *Frances* his wife unto the said *S. Webb* and *W. B. Freeland* upon the trusts thereinafter declared. And it was thereby declared that the said *S. Webb* and *W. B. Freeland*, and the survivor of them, should stand possessed of the moneys to arise from the sale of a moiety of certain real estate conveyed by a deed of even date to *S. Webb* and *W. B. Freeland* upon trust for sale, and of the aforesaid trust moneys, upon trust to pay out of the said trust moneys and premises the sum of £425 to the said *G. Webb* absolutely (which payment was made), and should, as and when the residue of the said trust moneys and premises should come to the hands of the said trustees or trustee "invest the same in their or his names or name on Government, parliamentary, or real securities in *England* or *Wales*," . . . with power to vary such investments in such manner as they or he should think fit, and should pay the income therefrom to the said *Frances Webb* during her life, and after her death should stand

possessed of the trust estate (in the events which happened) in trust for all the children of the said *Frances Webb* who should attain twenty-one or marry under that age.

G. Webb died in May, 1876, and *Frances Webb* died in November, 1886, and the Plaintiffs, *F. M. Webb* and *T. A. Webb*, were two of their children.

In June, 1875, the said *S. Webb* and *W. B. Freeland* had in their hands a sum of £1500, part of the said trust funds, which had been invested on mortgage and had been paid off; and they re-invested it on a contributory mortgage of freeholds. The mortgage deed was dated the 2nd of June, 1875, and was made between *H. J. C. Giblin* of the first part, the said *S. Webb* and *W. B. Freeland* of the second part, and *B. G. Giblin* and the said *W. B. Freeland* of the third part (which said several parties thereto of the second and third parts were thereinafter collectively referred to as "the mortgagees"), and contained recitals that the mortgagees had agreed to advance and lend the said *H. J. C. Giblin* the sum of £2000 upon having the repayment thereof with interest secured to them in manner thereinafter appearing, and that the said sum of £2000 was found and contributed by the mortgagees in the following proportions, namely, the sum of £1500 by the said *S. Webb* and *W. B. Freeland* out of moneys held by them on a joint account, and the sum of £500 by the said *B. G. Giblin* and *W. B. Freeland* out of moneys held by them on a joint account. Then followed separate covenants by the said *H. J. C. Giblin* with each set of mortgagees for payment of principal and interest due to them respectively. And by the now stating deed *H. J. C. Giblin*, in consideration of the premises, conveyed unto the mortgagees, their heirs and assigns, certain farm lands and hereditaments situate in the parishes of *Debden* and *Wimbish*, in the county of *Essex*, known by the name of "*Sampson's Farm*," to hold the same unto the mortgagees and their heirs to such uses and for such estates, ends, intents, and purposes as the said *S. Webb* and *W. B. Freeland*, as mortgagees to the extent of £1500 as aforesaid, or the survivor of them, his executors or administrators, and the said *B. G. Giblin* and *W. B. Freeland*, as mortgagees to the extent of £500 as aforesaid, or the survivor of them, his executors or administrators, should, jointly

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or separately, as such several mortgagees as aforesaid, and to the extent of their several debts, and either by way of realising their mortgage security and obtaining repayment of their principal and interest moneys, respectively, or by way of release or reassurance of the mortgaged hereditaments by any deed or deeds to be executed before the expiration of twenty-one years from the decease of the survivor of the mortgagees direct or appoint; and in default of such appointment to the use of the mortgagees, their heirs and assigns, subject to the proviso for redemption thereinafter contained: Provided always, that if the respective principal sums of money and interest thereinafter covenanted to be paid by the said *H. J. C. Giblin*, or either of such principal sums and interest, should be paid according to the aforesaid covenants for payment thereof respectively, the said hereditaments should on the request and at the costs of the respective person or persons entitled to the equity of redemption thereof, be reassured to or according to the direction and appointment of him, her, or them respectively by the persons or person who shall have received such principal and interest moneys. Joint powers of leasing and sale were conferred on "the mortgagees," with all usual clauses; and the deed contained a declaration by the mortgagees that the sum of £2000 was lent by them and that they were respectively interested in the same in the proportions thereinbefore recited.

In the year 1879 *H. J. C. Giblin*, being insolvent, and the interest on the mortgage being in arrear, "the mortgagees" took possession of *Sampson's Farm*, and let it at £85 per annum.

S. Webb died in October, 1880, and the Defendants, *J. C. Jonas* and *M. Slater*, were the executors of his will.

By deed, dated the 25th of October, 1884 (indorsed on the mortgage of the 2nd June, 1875), and made between the said *W. B. Freeland* and *B. G. Giblin* of the first part, *J. G. Bellingham* (seizinee to uses) of the second part, and the said *W. B. Freeland* of the third part, for the purpose of vesting the legal estate in the mortgaged premises in the said *W. B. Freeland* and the said *W. B. Freeland*, and *B. G. Giblin*, in proportion to the amounts of mortgage money respectively secured to them, the mortgaged premises were assured to the said *J. G. Bellingham* and his heirs

as to three equal undivided fourth parts to the use of the said *W. B. Freeland* in fee simple subject to the existing equity of redemption thereof, and with the full benefit of all powers and provisoes for securing the said sum of £1500 and interest, and as to the remaining one equal fourth part thereof to the use of the said *W. B. Freeland* and *B. G. Giblin* in fee simple, subject to the existing equity of redemption thereof, and with the full benefit of all powers and provisoes for securing the said sum of £500 and interest. And it was thereby declared that upon any exercise of the powers of letting and sale contained in the within written indenture the consent of the said *W. B. Freeland*, his executors, administrators, or assigns, and also the consent of the said *W. B. Freeland* and *B. G. Giblin*, and the survivor of them, and the executors or administrators of such survivor should be requisite to the valid exercise of such respective powers, and that the legal estate in the said security, and all powers relating thereto, should be exercised for securing the said sums of £1500 and £500 and interest and costs *pari passu*, and without any preference or priority.

The said *W. B. Freeland* died in November, 1885, and the Defendants, *E. N. Bellingham*, *J. G. Bellingham*, and *W. B. B. Freeland*, were the executors of his will.

After the death of *Frances Webb* in 1886, questions arose as to the appointment of new trustees of the settlement and the state of the trust funds, and ultimately the Plaintiffs commenced this action, alleging by their statement of claim that *S. Webb* and *W. B. Freeland* committed a breach of trust in investing the sum of £1500 on the mortgage of the 2nd of June, 1875, which was an improper security, and one not authorized by the settlement, and that the mortgaged property was an insufficient security for the £2000 advanced thereon, or even for the £1500, and claimed execution of the trusts of the settlement, a declaration that the investment of the £1500 on the said security was a breach of trust on the part of *S. Webb* and *W. B. Freeland*, the appointment of new trustees, and consequential relief.

The Defendants by their statement of defence denied the breach of trust, alleged that it had never been decided that trustees could not invest on a proper contributory mortgage, and that

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the said trustees so invested the fund believing that such security was a proper one, and that if the mortgaged property constituted an insufficient security, such insufficiency was due solely to the continued agricultural depression which had been continually increasing up to that time, and which could not have been foreseen or reasonably expected in the year 1875. Issue was joined, and this was the trial of the action.

It appeared that at the date of the mortgage the property was valued at £3090; but that its value, by reason of the agricultural depression, had now fallen to about £1500.

Barber, Q.C., and *Bardswell*, for the Plaintiffs:—

There is no case in which, in the absence of an express power, trustees under an ordinary power to invest on real securities have been held to be right in investing on a contributory mortgage. The principal objection is that, by so doing, they lose the sole control over the legal estate. Also they cannot foreclose, or sell, or let, or in fact exercise any of their powers of realising their security without the consent of the other mortgagees: *Lewin* on Trusts (1); *Davidson's* Prec. in Conv. (2); *Palmer* v. *Earl of Carlisle* (3); *Tolson* v. *Sheard* (4).

Warmington, Q.C., and *F. H. Colt*, for the Defendants:—

This is a case of first impression, and the Court will exercise its ingenuity rather to validate than to invalidate the transaction, especially when, as here, the trustees acted with the utmost *bona fides*, and exercised the ordinary prudence of men of business: *In re Speight* (5); *In re Whiteley* (6).

[KEKEWICH, J.:—Must you not first get over the difficulty that this was not an investment "in their or his names or name" in accordance with the investment clause?]

No doubt the first question is to consider the terms of the trust, and then whether the trustees have acted with ordinary prudence. This mortgage was a "real security": *Robinson* v.

(1) 6th Ed. p. 292.
(2) 4th Ed. vol. ii. part ii. p. 385.
(3) 1 S. & S. 423.
(4) 5 Ch. D. 19.
(5) 22 Ch. D. 727.
(6) 33 Ch. D. 347.

Robinson (1), and it was taken in the names of the trustees. The fact that the property was also conjointly charged in favour of other parties makes no difference. It is competent for trustees having a power to invest on real securities to invest on mortgage of an undivided share of real estate, and the difference between a mortgage of that kind and this is very shadowy. The whole instrument must be looked at. In all the cases cited the trust funds were so mixed that it was impossible to shew which was trust property and which was not. This is a distributive security, and there is no mixing of the trust funds, but each fund is kept distinct with separate covenants with each set of mortgagees; and, although the legal estate is given to the four mortgagees, yet the power of appointment shews that the power over the legal estate is restricted to the extent of the interest of each set of mortgagees. Therefore one set of mortgagees could not convey the entire legal estate without reference to the other mortgage money. This kind of security is taken every day by persons lending money on mortgage, and will the Court say that trustees are to be liable for a breach of trust if they take such a security, which is not forbidden by the trust and not forbidden by the rules of the Court? As to the power of sale, that objection is answered by the fact that it is not a breach of trust to take a mortgage without a power of sale; and after *Luke* v. *South Kensington Hotel Company* (2) there is very little in the objection that the trustees could not realise their security without the concurrence of the other mortgagees.

Barber, in reply.

KEKEWICH, J.:—

I cannot help regretting that I am obliged to decide this point, and still more so because I think it is my duty to decide it against the trustees. Personally, if I may say so, I am extremely unwilling to treat trustees otherwise than with the greatest leniency which the law permits when they have acted honestly; and I have not the slightest doubt that in this case they acted honestly, that is to say, with an anxious desire to do their best

(1) 1 D. M. & G. 247. (2) 11 Ch. D. 121.

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for their *cestuis que trust*, and to invest the money on what they believed to be a sufficient and prudent security. But I have not to consider in this case any question of prudence, exercise of discretion, or honesty in the usual and proper sense of the word. I have only to consider whether the trustees, as agents of their *cestuis que trust*, have fulfilled the terms of their authority or gone beyond their authority. I have already said, and I repeat, that it is no answer for an agent, who is blamed for having omitted to do that which he was told to do, or done something in excess of that which he was told to do, to say: "What I have done has been done in good faith, and is beneficial to my principal." The agent is bound to keep himself within the terms of his authority.

The authority in this case was one to the trustees to invest certain moneys coming to them as trustees of a settlement "in their or his names or name, on Government, Parliamentary, or real securities in *England* or *Wales*, or in the security of the bonds or debentures of any railway company or railway companies incorporated by Act of Parliament, or in the security of settled personalty." The only words which would cover such a security as is here in question, are the words "real securities," and the property in this case being freehold, there is no question but that there was a real security. The question, as applied to such an investment clause, and to the circumstances of this case, turns on the meaning of "in their or his names or name." At first sight it seems to be, and to those not so frequently dealing with these matters it may on reflection still seem to be, a narrow holding, and really dealing with minor matters, to insist upon a security being in the names of the trustees. But to my mind, that is the very essence of the investment clause, at least as important as the securities in which the investments are to be made. Mr. *Colt* put it to me in this way. It so happens that you have the names of two other persons, and what difference can it make that you are investing in the names of two trustees of this settlement together with two trustees of some other settlement? What difference is there in that from investing in the names of the two trustees of this settlement and an entire stranger? The answer to that is, "No difference at all." I think it would be equally a breach of trust for the two trustees to invest in the

names of themselves and a stranger. I mean, that if there was no contributory mortgage at all, and two trustees invested on a regular mortgage in the names of themselves and a stranger, that is, a person who was not authorized to hold the security, who was not authorized to receive money, who was not authorized to exercise powers on behalf of the trusts of the settlement, that, to my mind, would be a direct breach of trust. When I turn to the settlement itself, I see the principle emphasised at every turn. It is not necessary to spell through the deed or to examine the different provisions of it, but the first observation is that the whole estate is conveyed to the four persons, so that these two trustees of this settlement, who were bound to keep entire control of the moneys entrusted to their care and control, therefore, of the securities in which that money was invested, lose, or rather do not get, at the very outset the one thing which is the most useful part of a mortgage security, namely, the legal estate. The legal estate is not vested in them. It is vested in them and other persons jointly. True it is that the conveyance of the legal estate is preceded by a declaration of uses which gives a power of appointment to them, that is to say, to the two trustees of this settlement and the other two jointly or separately, and that some meaning must, of course, attach to that declaration of uses, that power. I am not by any means sure what was in the mind of the draughtsman, but I accept Mr. *Warmington's* suggestion, which is at least plausible, that it was with a view of enabling the mortgagees to transfer their particular security, that is to say, the particular sum in which they were interested, so as to enable one part of the security to be dealt with without the other. It was, as a matter of fact, exercised by a subsequent deed in a manner to which I will call attention directly. Then it is said that the power of sale, which we all know is an important part of a mortgage, is so expressed that either set of mortgagees may sell, and if they may sell they may also let. It certainly is not a convenient power for persons to have who desire to realize their security in that way, and it might give rise to considerable trouble, but as that is said to be vested in the two sets separately, I would rather not rely upon that. But this I can see, that the two trustees of this settlement,

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that is to say, one set of mortgagees, could not well enter without the concurrence of the other, or, if they entered, they would enter on behalf of themselves and the others, and whatever they did they would do, and whatever happened would be done, for the benefit of both sets of mortgagees. No step could be taken, no money could be received, no terms of arrangement could be made, without its being for the benefit of all. It is said that is an essential part of a contributory mortgage. That may be so, and this may be an ordinary form of contributory mortgage, I do not know that it is not; but if what I have just adverted to be a necessary result and a necessary incident of a contributory mortgage, that, to my mind, is one of the strongest reasons for saying that trustees cannot invest on a contributory mortgage. To my mind, trustees not having any power expressly given them, are bound to invest on a mortgage where they have the entire control in their own hands, and where they can exercise their own discretion for the benefit of their *cestuis que trust*, and not where they are bound to consult others, or where, if they do not consult others, they are bound to act for the benefit of others as well as for themselves. It robs them of that control which is an essential part of the propriety of the security. Another objection is that if they are bound to foreclose, they must bring the other parties before the Court. That may or may not be so important a matter; and though no doubt according to the decision in *Luke* v. *South Kensington Hotel Company* (1), one set might commence proceedings for foreclosure making the other set Defendants, that obviously is not the ordinary or the convenient course. They would have to correspond with other trustees, there might be proceedings pending with regard to the other trusts, they might be involved in all sorts of difficulties—difficulties which frequently are incident to an investment on mortgage and must necessarily be so according to our law of real property, but not difficulties which trustees ought to embrace in the first instance and to really reserve for themselves against the rainy day. If the rainy day comes, the trustees ought to be utterly unembarrassed by their own acts, though the law or other adverse circumstances may embarrass them. Now after the date of this

(1) 11 Ch. D. 121.

mortgage, and after the death had occurred of one of the trustees, another deed was executed on the 25th of October, 1884; and by that the power of appointment was exercised so as to vest the legal estate in the mortgage premises, as to three-fourths in the persons entitled to the mortgage for £1500, and as to one-fourth in the persons entitled to the £500. Whether that was wise or convenient I think it unnecessary to consider, but the provisions which followed that appointment reserved all powers as before, so that nothing really was done, except that the legal estate instead of being vested entirely in the four, or the three as the survivors of the four, was vested in undivided shares in the two and one. I adopted Mr. *Colt's* view of that, but I think it made the matter neither better nor worse; and holding it to have been bad before I must hold it to remain bad still. The relief asked by the statement of claim is precisely what the Plaintiffs are entitled to according to my judgment.

Solicitors for the Plaintiffs: *Letts Brothers.*
Solicitors for the Defendants: *Aldridge, Thorn, & Morris.*

H. L. F.

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[1887 H. 1272.]

Chattels stored in a Room as Security for Loan—Delivery of Key—Memorandum of Transaction—Pledge or Bill of Sale.

In a pledge of goods it is not essential that the advance and delivery of possession should be contemporaneous. It is sufficient if possession be delivered within a reasonable time of the advance in pursuance of the contract to pledge.

In November, 1883, *A.* agreed to lend *B.* £2500 on the security of a valuable collection of prints and engravings. On the 19th of November, 1883, *A.* advanced *B.* £1250 on account of the loan, and it was arranged between them that the collection should be stored in a certain room, and on the 21st of December, 1883, *B.* wrote to *A.*, "the collection was moved in to-day. *L.* has the key which I place entirely at your disposal." On the 24th of December, 1883, *A.* advanced to *B.* the balance of the loan, and on the 11th of January, 1884, *B.* wrote to *A.*: "You having advanced to me the sum of £2500, I hereby authorize you to retain possession of my collection of engraved prints, now deposited by me in a certain room . . . the key of which room is at present in your possession or power; and I

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hereby acknowledge that you are to retain possession of such prints, &c., until the whole of the said sum of £2500, with interest at 5 per cent., has been repaid to you." *B.* died insolvent, and his administratrix disputed the validity of *A.*'s security on the ground that the letter of the 11th of January constituted a bill of sale, which was void under sects. 8 and 9 of the *Bills of Sale Act*, 1882:—

Held, (1) that the transaction was one of pledge, independent of the letters, and that the *Bills of Sale Act* did not apply; and (2) that the pledge was perfected by delivery of the key to *L.*, which amounted to constructive delivery of the goods to *A.*

THE Plaintiff and one *Stephen Tucker* were members of the *Royal Archæological Society;* and in November, 1883, the Plaintiff, at the request of *Stephen Tucker*, agreed to lend him £2500 on the security of certain deeds. The deeds were handed to the Plaintiff, and on the 19th of November, 1883, the Plaintiff advanced *Stephen Tucker* £1250 on account of the loan, and on the 20th of November, 1883, *Stephen Tucker* executed a bond in common form in favour of the Plaintiff to secure the £1250 and interest. Very shortly afterwards *Stephen Tucker* expressed a wish to the Plaintiff to substitute his collection of engraved portraits, prints, &c., and to have the deeds back, and it was arranged between them that *Stephen Tucker* should hire a small room in *Oxford Mansions, Oxford Street*, and should store the collection there for the benefit and protection (by way of security) of the Plaintiff. Accordingly, on the 21st of December, 1883, *Stephen Tucker* wrote to the Plaintiff as follows: "The collection was moved in to-day, and I have arranged with *Larking* (*R. A. I.*) to spend—subject to your approval, for I thought it would be better for you to have one already in a sense under your control—a certain time in the room every day in making a list. This I shall afterwards edit into a perfect catalogue. . . . *Larking* has the key, which I place entirely at your disposal."

On the 24th of December, 1883, the Plaintiff advanced the remainder of the £2500 to *Stephen Tucker*, and on the 11th of January, 1884, *Stephen Tucker* executed a similar bond in favour of the Plaintiff to secure £1250 and interest, and at the same time handed to him the following letter:—

"*London*, 11 January, 1884.

"Dear Sir,—You having advanced to me the sum of two

thousand five hundred pounds on two bonds for one thousand two hundred and fifty pounds each, executed by me, I hereby request and authorize you to retain possession of my collection of engraved portraits, prints, and all other property now deposited by me in a certain room in *Oxford Mansions, Oxford Street*, the key of which room is at present in your possession or power; and I hereby acknowledge that you are to retain possession of such portraits, prints and property until the whole of the said sum of £2500 with interest thereon at five pounds per cent. per annum from the date of the said bonds respectively shall have been repaid to you.

"Yours faithfully,

"*Stephen J. Tucker.*"

Larking was a clerk at the Institute of the *Archæological Society*, and was employed and paid by *Stephen Tucker* to make a catalogue of the collection. The room was hired and the rent of it was paid by *Stephen Tucker.*

In January, 1886, *Stephen Tucker* died intestate and insolvent. The Defendant *Mildred Tucker* was his legal personal representative.

A question having arisen between the Plaintiff and Defendant as to the validity of his security, the Plaintiff commenced this action, claiming (1) a declaration that he was entitled to hold and retain possession of the said portraits, prints and effects as a security for the principal and interest due to him under the said bonds; (2) a sale of the property comprised in his security. The Defendant set out in her statement of defence the letter of the 11th of January, 1884, and alleged that it was a bill of sale and void under sects. 8 and 9 of the *Bills of Sale Act*, 1882. Issue was joined and this was the trial of the action.

It appeared from the evidence that the Plaintiff did not obtain actual possession of the key until after *Stephen Tucker's* death; and also that there was a duplicate key of the room which was held by the housekeeper at *Oxford Mansions* to enable him to have access to the room for the purpose of cleaning it.

Henn Collins, Q.C., and *Bradford*, for the Plaintiff:—

The transaction was one of pledge, entirely independent of the

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letters. The money was advanced, the room taken, and possession given before the letter of the 11th of January, which was merely an historical record of the transaction. The letter was never intended to operate as a transfer of any property in the goods: *Ex parte Hubbard* (1).

Barber, Q.C., and *A. W. Rowden*, for the Defendant:—

Tucker was the ostensible owner of the room. He hired it and paid the rent of it. Upon the authorities the evidence is insufficient to support a pledge completed, and actual possession given and taken, before the letter of the 11th of January: *Ex parte Close* (2); *Ex parte Parsons* (3); *Ex parte Hubbard*; *In re Cunningham & Co., Limited* (4). In order to make a good pledge, there must be an advance accompanied by an immediate transfer of possession. That is the distinction that runs through all the cases—an agreement to pledge will not do: *Coote* on Mortgages (5). Here actual possession was not obtained until after *Tucker's* death, because the delivery of the key to *Larkin* conferred no more than the right to enter the room, and did not amount to a symbolical transfer of the property in the chattels: *Ancona* v. *Rogers* (6); *Meyerstein* v. *Barber* (7). The true inference from the facts is that the letter of the 11th of January was an authority to the Plaintiff to retain possession of the chattels when he got them—for he had not in fact possession at that time—in which case it is a bill of sale and, not being in the prescribed form and unregistered, is void.

Henn Collins, in reply:—

An agreement to pledge, if followed by possession given whilst the agreement subsists, is good: *Reeves* v. *Capper* (8). The handing of the key to *Larkin* for the Plaintiff was constructive delivery of possession to the Plaintiff: *Ellis* v. *Hunt* (9); *Chaplin* v. *Rogers* (10); *Gough* v. *Everard* (11); *Whitehead* v. *Clifford* (12);

(1) 17 Q. B. D. 690.
(2) 14 Q. B. D. 386.
(3) 16 Q. B. D. 532.
(4) 28 Ch. D. 682.
(5) 4th Ed. p. 578.
(6) 1 Ex. D. 285, 292.
(7) Law Rep. 2 C. P. 38, 45, 49, 661.
(8) 5 Bing. N. C. 136.
(9) 3 T. R. 464.
(10) 1 East, 190.
(11) 2 H. & C. 1.
(12) 5 Taunt. 518.

Roscoe's Nisi Prius (1). The transaction was complete in itself and stands by its own inherent strength, and the documents are immaterial and may be disregarded: *North Central Wagon Company* v. *Manchester, Sheffield and Lincolnshire Railway Company* (2).

KEKEWICH, J.:—

It would not be right to say that this is a bill of sale case, because to say so would conclude the real question which arises. To my mind there is no such thing in question here as a bill of sale. The Plaintiff's case is that there has been a pledge of goods, namely, pictures and engravings, and such like articles, and the Defendant's case is that there has been no pledge. What is a pledge is common knowledge. It is scarcely necessary to state what it is, but I will take the words of Lord Justice *Bowen* in the case of *Ex parte Hubbard*. He says (3): "There is another entirely distinct transaction, which was known to the Romans, and has been long familiar to English law, the transaction of a pawn or pledge, where there must be a delivery of the goods pledged to the pledgee, but only a special property in them passes to him, in order that they may be dealt with by him, if necessary, to enforce his rights—the general property in the goods remaining in the pledgor." The pledge, therefore, consists in the delivery. At any rate a delivery is an essential part of the pledge, and, as stated by Mr. Justice *Willes* in *Myerstein* v. *Barber* (4): "With respect to a pledge, according to the law of this country, a mere contract to pledge even specific goods, and even although the money is actually advanced upon the faith of the contract, is not sufficient to carry the legal property in the goods." It is unnecessary for me to examine the *Bills of Sale Act* of 1878 or 1882, but I certainly understand that neither of those Acts was intended to be applied, or is applicable, to a parol contract or to anything of the character of a pledge. That is left to be dealt with by the common law, and is outside the statute altogether. I certainly also understand the cases to go this length, that, if you have a pledge, that is to say, a

(1) 15th Ed. pp. 310, 474, 1153.
(2) 35 Ch. D. 191, 205.
(3) 17 Q. B. D. 698.
(4) Law Rep. 2 C. P. 51.

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contract involving the advance of money and the delivery of the goods, that can no doubt be enforced quite irrespective of any authorities decided on the statute or the statute itself. The question to my mind, therefore, is whether there has here been a pledge of that character. What was the bargain I have no doubt at all. Mr. *Hilton*, the Plaintiff, agreed in the autumn of 1883 to make an advance to Mr. *Tucker* on certain security, which security was afterwards, by agreement between them, changed to the security now in question. No money was advanced until the 19th of November, 1883, but £1250, part of the £2500, was then advanced, and there was a further advance about a month subsequent to the first advance. Before the first advance there had been no delivery. That is common ground. About the date of the further advance there was a delivery, and there can be no question that the second advance and the delivery were for all practical purposes contemporaneous. There was a contract therefore binding in honour, but whether binding in law is the question which I have to decide, that the money advanced should be charged on these goods. The goods were afterwards dealt with in a peculiar manner. They were up to that time under the control and in the possession of Mr. *Tucker*, the borrower. They were not delivered, in the sense in which one ordinarily sees goods delivered, to the lender, Mr. *Hilton*; that is to say, they were not taken to his house; they were not taken to any warehouse and entered in his name; no receipt was given by any wharfinger, or any person of that character, to him admitting his right to ownership or the right of delivery to be in him; but they were deposited in a room in a certain house, which seems to have been selected only because the borrower and the lender were connected with the *Archæological Society*, whose museum was in that house. There a room was taken for the deposit of these goods. The room was taken by Mr. *Tucker*, the borrower, and he not only paid the rent for it but he also paid what was necessary from time to time for keeping the room in order—for dusting, cleaning, and so forth; so that, in no sense, according to the ordinary use of the word, could it be called Mr. *Hilton's* room. The key or keys, for there seem to have been two, but at any rate the key of the room

seems to have been hung up in the way in which one knows the keys of a large house, let off in flats, are hung up, in some hall or porter's or steward's office, where the proprietor of the room could come and get possession of the room from time to time. If it stopped there I should unhesitatingly hold that possession had not been given to Mr. *Hilton*; but there was something more than that. On the 21st of December, 1883, Mr. *Tucker* writes a letter to Mr. *Hilton* in which he refers to the collection having been moved in in pursuance of the agreement, and he refers there to the arrangement which he determined to make, and to which I must take it for granted that Mr. *Hilton* assented, that there should be a list made of these goods; but in the letter he says: "*Larkin* has the key, which I place entirely at your disposal." The key was there. I think it is immaterial whether the key was in the actual manual possession of *Larkin* or some other officer of the establishment. It was there, and Mr. *Tucker* says, "It is entirely at your disposal." It was also to a great extent at the disposal of Mr. *Tucker* himself, and those he employed to make the list and to do what he thought right. This state of things went on for some time longer, and on the 11th of January, 1884, Mr. *Tucker* wrote the letter which is said to be a bill of sale, that is to say, in this sense, that it ought to have been registered, or, being incapable of registration, it avoids the whole transaction. The letter commences: "You having advanced to me the sum of £2500 on two bonds for £1250 each, executed by me, I hereby request and authorize you to retain possession of my collection of engraved portraits, prints, and all other property." I admit the accuracy of Mr. *Barber's* criticism that an authority to retain possession does not necessarily imply that the possession has been given, and that it may refer to a possession to be hereafter had, or to be had at the date of the letter, to retain that which has been given. But he goes on "now deposited by me in a certain room in *Oxford Mansions, Oxford Street*, the key of which room is at present in your possession or power, and I hereby acknowledge that you are to retain possession of such portraits, prints, and property, until the whole of the said sum of £2500 with interest thereon at £5 per cent. per annum from the date of the said bonds, respectively, shall have been

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repaid to you." To my mind that is a statement by Mr. *Tucker*, entirely consistent with his letter of the 21st of December, that those goods deposited by him in that room are at present in the possession of Mr. *Hilton*. Now is there anything inconsistent with Mr. *Hilton's* possession in Mr. *Tucker* having this right of ingress and egress to make lists, and to clean the place, and so on? To my mind there is not. It would be more satisfactory, no doubt, in a case of this kind, and avoid all dispute, if they had been deposited in a room under the exclusive control of Mr. *Hilton;* but assuming, as I do, on the facts not disputed, the entire *bona fides* of both parties, and the absence of any intention to defraud either one another or any outside party, it seems to me that it is quite consistent with the honesty of the transaction that there should be some laxity in the control of the room, Mr. *Tucker* from the first to the last acknowledging that whatever power he might have, it was a power subject to Mr. *Hilton's* paramount control. I do not rely on the fact of the key having been handed over. There are several cases cited on the interesting question of the effect of delivery of a key. I think, when they are examined, they all really come to this, that the delivery of the key in order to make constructive possession must be under such circumstances that it really does pass the full control of the place to which admission is to be gained by means of the key; as, for instance, where timber is deposited in a warehouse. The delivery of the key is the symbol of possession where the possession itself is practically impossible. A man being unable to carry about with him, or, at any rate, to conveniently move to his own warehouse adjoining, a large quantity of timber, the delivery of a key giving exclusive control is regarded as delivery of possession itself. I think that principle runs through all the cases on delivery of the key as equivalent to delivery of possession. That being so, I must decide this question of law which has been raised—whether it is essential to a pledge, not that there should be a delivery, because that is admitted to be essential, but that delivery should be actually contemporaneous with the advance of the money. When I say actually contemporaneous, I am not proposing to discuss a case where delivery has followed within an hour or a day afterwards, so that in support of the

honesty of the transaction one might assume them to be practically contemporaneous, though not identical in point of time. But what is the effect where an advance is made as here, in November, and the delivery is not given until a month later, but then comes in pursuance and in fulfilment of the contract. I have pointed out that until delivery is made there is nothing but a contract, and the contract does not pass the property without such incidents as I have already mentioned. But I am not aware of any authority which goes so far as to say that the delivery must be contemporaneous, so long as it is in honest fulfilment of the contract; and that case of *Reeves* v. *Capper* (1) certainly is an authority the other way. Mr. *Barber* says that *Reeves* v. *Capper* would not be decided in the same way now as it was decided by a full Court of Common Pleas fifty years ago, or nearly so. But until that case is overruled it is binding upon me, and I, of course, must follow it, but I think it right to add, irrespective of that decision, I am at a loss to understand why delivery should be actually contemporaneous with the advance. It seems to me that the transaction may be divided into two parts, and that though fraud may intervene in any case, however careful lawyers or actors may be, still remembering that, in the meantime, there is no property in the lender until he has got the goods, it seems to me a very small opening for fraud to hold that the delivery need not be actually contemporaneous with the pledge. My view of the law certainly is, that if money is advanced, as here, on a contract that goods shall be delivered and that then those goods are delivered in pursuance of that contract, the same legal results follow as if the money was handed over with one hand and the goods received with the other. That is the view on which I decide it. It is a matter of some importance and apparently of some novelty, but, that being so, I must hold the Plaintiff entitled to the relief which he asks, and he will add his costs to his security.

Solicitors: *Curtis & Hilton; H. C. Godfray.*

(1) 5 Bing. N. C. 136.

H. L. F.

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July 14, 16, 17, 18.

BLANK *v.* FOOTMAN, PRETTY, & CO.

[1877 B. 3678.]

Design—Previous Publication—Shewing Design—Sufficient Mark—Costs of successful Defendant of Defences in which he has failed—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 51.

The inventor of a design shewed it to and consulted his agent. The agent consulted another person, and also shewed it to two customers, and asked them for orders:—

Held, that there had thus been a previous publication, and that subsequent registration of the design under the *Patents, Designs, and Trade Marks Act*, 1883, was therefore invalid.

A narrow coloured trimming was sold by the maker in pieces of many yards, having round them paper bands bearing "R[d]," and the registration number:—

Held, that they were sufficiently marked within the *Patents, Designs, and Trade Marks Act*, 1883, s. 51.

Where the defendant succeeds generally he may have the costs of some of his defences on which he has not succeeded; but where he has raised a distinct issue and has failed, he ought not to have the costs of that issue.

THE Plaintiff in this case, *Emilius Blank*, by his agent, *Rudolf Blank*, registered, on the 23rd of November, 1885, a design for coloured trimmings to corsets. The Plaintiff alleged that the Defendants, *Footman, Pretty, & Co.* had imitated the design, and he claimed an injunction to restrain them from infringing the design.

The Defendants said (1) They had not infringed any legal right of the Plaintiff; (2) The design had not been duly registered; (3) The provisions of the Act as to marking had not been duly complied with; (4) The design was not a new or original design not previously published; (5) The design was not capable of being registered; (6) The Plaintiff was not the proprietor; (7) A general denial of imitation.

This was the trial of the action. The imitation was practically not disputed, and the principal defence was, that the design had been published before the registration, under these circumstances. *Rudolf Blank* had consulted one *Hummel* as to whether the design was likely to succeed. *Hummel* had consulted one *Sewell*, and

had also shewn the design to, and asked for orders from, two of *Hummel's* customers. The circumstances are fully stated in the judgment.

As to the marking, there was no mark on the trimmings, but the trimmings were sold by *Blank* in pieces of many yards' length, each piece having round it a paper band on which was printed "R[d]" with the registration number.

Aston, Q.C., *Kennedy*, Q.C., and *Ashton Cross*, for the Plaintiff:—

The Plaintiff is the proprietor of this design, and has registered it under the *Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 Vict. c. 57), s. 47. His agent in this country has only shewn it in confidence to his agent and adviser, but that is no publication within the meaning of the Act. There has been no dedication to the public, for his agent could not have used the design, in which he had an inchoate right: *Jefferys* v. *Boosey* (1).

As to marking under sect. 51, it would be impossible to mark each piece of trimming, and the label round each parcel sold was a sufficient compliance: *Fielding* v. *Hawley* (2).

Witnesses were examined on both sides, principally as to what had been done by *Hummel*.

Warmington, Q.C., and *Carpmael*, for the Defendants:—

Shewing a pattern and asking for orders is a publication, and after that the design cannot be registered. There is no occasion to prove a dedication to the public: *Germ Milling Company* v. *Robinson* (3); *Dalglish* v. *Jarvie* (4); *Humpherson* v. *Syer* (5). *Fielding* v. *Hawley* is in favour of the Defendants.

Aston, in reply.

KEKEWICH, J.:—

There is no occasion for me to decide, and I do not intend to decide, any question of morals; and fortunately, according to the

(1) 4 H. L. C. 815.
(2) 48 L. T. (N.S.) 639.
(3) 3 Rep. Pat. Cas. 254, 259.
(4) 20 L. J. (Ch.) 475.
(5) 4 Rep. Pat. Cas. 407.

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view which I take of the case, there is no occasion for me to decide, and I do not intend to decide, any question on which there is a conflict of evidence. The facts upon which I intend to base my judgment are facts about which there is no substantial doubt, and which, I think, may be taken as common ground.

The Plaintiff, *Emilius Blank*, through his agent in this country, *Rudolf Blank*, registered the design in question. The Defendants have infringed upon that design; that is to say, they have made or sold an article of that design. They insist that they are entitled to do so, and that is the legal question which I have to decide on the facts, as they are not entitled to do so if, as a matter of fact, this design was properly registered when it had not been previously published in the *United Kingdom*. The question to be decided is, therefore, whether the design was published previously to the registration.

Mr. *Blank* may be treated as the manufacturer, though he does not manufacture in this country. He is the agent of manufacturers in *Germany*, and he is the seller in this country of their manufactured goods, and he may be treated as practically the manufacturer. Mr. *Hummel* is a commission agent. He sells these goods, and goods of this kind, and he has a bargain or understanding with Mr. *Blank* that he shall have the sole and exclusive right of selling goods of this class in the *United Kingdom*. Therefore Mr. *Hummel* has an interest in any design of Mr. *Blank's* in goods of this class, and though he is not a partner, or in any way a partner, he has that interest which makes him a person whom Mr. *Blank* would naturally consult before endeavouring to put any of that class of goods on the market. Mr. *Blank*, therefore, having sketched this design, shews it to Mr. *Hummel*. I cannot conceive that in doing so he would be publishing the design in any sense which could be placed on that word. Even if that relation had not existed between the two parties I see no reason why a designer should not call in an expert—a gentleman whom he knows to be experienced in the trade, likely to advise him well, and whom he can trust, for the purpose of advising him before incurring further expense and trouble. But the relation which I have described existing, there cannot be to my mind the slightest doubt about it. Therefore, in calling in Mr. *Hummel* and

shewing him the sketch, and shewing him the designs as altered from time to time, for they were altered over and over again, and in consulting him respecting the cost and other details, I consider that Mr. *Blank* was only doing that which he was fairly entitled to do, the confidential character of the communications being a necessary incident to the relation between the two parties.

If it had stopped there I might have disposed of the case easily enough. But Mr. *Blank* was not content to stop there. Mr. *Blank* not only desired to get the full advice of Mr. *Hummel*, but he very naturally wished, and I cannot blame him as a prudent man of business for wishing as he did, to ascertain, before he went any further whether this was a design which was likely to take. By what words, and on what occasion, and with what restrictions I have no knowledge, but he certainly did intrust Mr. *Hummel* with the duty of soliciting orders (that is one expression), and ascertaining from likely purchasers whether orders could be got for this design when it had taken a material form, when there was trimming to be sold, and, according to the Plaintiff's own view, when it had been registered. Mr. *Hummel* accordingly consults three different gentlemen, and I think I must deal with them in two classes. First, there was Mr. *Sewell*. Mr. *Sewell* was Mr. *Hummel's* largest customer. He was a manufacturer who apparently purchased a large quantity of trimmings of this kind, and was well known to Mr. *Hummel*, and was in constant communication with him. Determining not to enter into any question of conflict of evidence, and not wishing to infer anything which is not actually proved, I only assume on the facts before me that Mr. *Hummel* shewed this design to Mr. *Sewell* to get his advice, and to ask him whether he would be prepared to give orders to be executed at a later period. He ascertained Mr. *Sewell's* views. He ascertained from him that the price at that earlier date was to his mind excessive, and no doubt there were other criticisms. Now Mr. *Aston* has cited to me, and I am content to take, the statement of Lord Justice *Bowen* in *Humpherson* v. *Syer* (1) as to what must be established in order to take a case of disclosure (I avoid the word "publica-

(1) 4 Rep. Pat. Cas. 413.

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tion") out of that publication which will destroy a patent or design. Lord Justice *Bowen* says: "I think when a man sends a patent to be made to a shop, you must take what passes orally; you must take all the circumstances of the case, and ask yourself whether there was any confidential relation established between the two parties—whether it was an implied term of the employment that the information should be kept by the shopman to himself, or whether he might afterwards, without any breach of good faith, use the matter, and use it as he choose." It is to be observed that these words are applied by the Lord Justice with reference to the facts of the particular case before him—to information given to a shopman who is going to manufacture. That is to say the Lord Justice is dealing with a case where, from the very necessity of the thing, some other person must be employed. The patentee, whether it be a chemical patent or a scientific patent or a machinery patent, frequently (generally I might say) is unable to carry out the manufacture of the patented article in all its details himself personally. He must employ others, and for that purpose the Lord Justice says he is entitled to do so without in the slightest degree damaging his patented rights to claim protection, provided it is done confidentially. It is a step further to say that a man like Mr. *Blank* is entitled to take into his confidence a man like Mr. *Hummel*, who is only a commission agent, a man through whom the profits are to be made. He does not occupy, to my mind, a position at all similar to that of the shopman. But I think it is only a fair stretch of the same principle to say, as I have already said, that I think a man in Mr. *Blank's* position might consult with those through whom he would put goods on the market, particularly, as I say, having regard to the relation existing between them, and doing it confidentially, without avoiding his rights to be obtained by registration.

But is Mr. *Hummel* when consulted in that way to be entitled to go on to any other person or number of persons and still use the same confidence—a delegated confidence placed in him by Mr. *Blank*. If so I do not know where it is to stop. If Mr. *Hummel* consults Mr. *Sewell*, who is a very large manufacturer as I am told, and that is said to be in confidence, he again may consult many of the persons for whom he works, and so on to the end of the

chapter. I see no limit to the confidence which may thus be placed in one person after another. What the Lord Justice *Bowen* says there, which I read as a statement by reference to a particular instance of a broad principle, has in my mind no application to a case like this, where the one person taken into confidence, for his own purposes quite as much as for any other (I do not blame him for it), consults a manufacturer, perhaps in confidence. Mr. *Hummel's* interest was to sell this article. Mr. *Hummel's* interest was to ascertain that it would be saleable, and he might very well consult those whom he trusted. But whether he could do so without running the risk of publication is an entirely different question. However, nothing really was done, as I understand the evidence of Mr. *Sewell*, in the way of actually giving an order until very much later, when the thing had been completed, and I do not think it necessary to decide this case, I will not say on the mere exhibition, but on the mere disclosure (the word I used before) of these sample patterns by Mr. *Hummel* to Mr. *Sewell*.

But then comes another delegation of confidence illustrating what I have said.

[His Lordship then said that *Hummel* went to *Portsmouth* and consulted two of his customers there, who gave orders, whether to be executed before registration or after. These two customers received samples but did not shew them, yet his Lordship saw no reason why if they had been disposed to act badly to Mr. *Hummel* they should not themselves have had some of the designs manufactured for themselves, and if Mr. *Blank* had proceeded against them they might have answered that if Mr. *Hummel* had committed a breach of confidence, it was he whom Mr. *Blank* must proceed against.]

I cannot understand what meaning to give the words "previously published" if that is not publication. In truth the only ground on which the want of publication has been argued is the question of confidence, and that I have already dealt with. Even if there was no publication to Mr. *Sewell* (which I do not think it necessary to decide, though I think there was), in my opinion there was certainly publication at *Portsmouth*, and from that time forward it was impossible for Mr. *Blank* to register the design.

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This seems to me entirely conformable to the policy of the Act, which is intended, as I understand it, to protect those clever and industrious people who spend their time, their money, and their brains in designing a pattern which may or may not prove successful, but as a work of art is entitled to protection in order that it may become a subject of profitable commerce. But I see no reason for applying that principle to the case of a man who prefers to act differently, and who says, "I will design and I will spend my time and my money when I am quite satisfied that I shall find a market." Mr. *Blank* not unnaturally has attempted to avail himself of the Act in order to get protection for that which the Act is not intended to protect. I think that when he registered the design it had been previously published in the *United Kingdom.*

[His Lordship then disposed of a question whether the design was registered in the proper class.]

As regards the question whether the goods are sufficiently marked, the real point is whether under sect. 51 Mr. *Blank* loses the benefit of his copyright, that is to say, whether the copyright in his design has ceased because the different articles which have been sold in the market have not been marked with the prescribed mark, or (for it is pressed further than that) because they have not been marked at all. It has not been argued that the trimming itself ought to be marked, and it would be impossible, and it is admitted that it would be impossible, to say where and how often it should be marked. It is obvious that you could not mark every quarter of an inch, and that even if you could do it, you could not in lace work like this preserve the thing if you were to stamp it with marks. Therefore it is not suggested that this ought to be done, but it is said that every article, however small, ought in some way to shew that it is a registered design. That to my mind is entirely a misconstruction of the 51st section. The Act may or may not go far enough, but the Act says that a mark is to be placed before delivery on sale of any articles to which a registered design is to be applied. The marking is to be caused to be done by the proprietor of the design. If the proprietor of this design does not sell those articles of dress to which the trimmings are affixed, the section

lays no liability upon him to mark those articles of dress. What is to be marked by him is the article to which a registered design has been applied—that is the trimming. If he sells it in pieces of 144 yards he must mark the pieces of 144 yards. If on the other hand he sell small pieces, whether for patterns or for use, he must mark each small pattern in some manner in which those things can be conveniently marked, as, for instance, by tying on a label or by printing something on the packet in which it is. But he is not bound to mark any thing but that which he sells, and that is the exact consequence of the decision in *Fielding* v. *Hawley* (1). There the Court held that whether it was a small piece or a large piece he must mark the piece sold, and so I say —he must mark the piece sold and need not mark anything else. That is the obligation the law lays upon him, and it seems to me that in this case the obligation has been complied with.

I have thought it right to express my opinion upon that question, but on the greater question of publication or want of novelty I am in favour of the Defendants, and there will be judgment for them and consequent relief.

Aston, Q.C., asked for the costs of the issues as to which the Defendants had failed. They had raised seven defences and had succeeded in one only, that as to previous publication.

KEKEWICH, J.:—

I have, as sitting in equity, full power over the costs, and I do not consider this analogous to a patent case, if that would make any difference. The difficulty which I feel as a Judge, and always felt when at the Bar, is this: the defendant is entitled to put his back against the wall and to fight from every available point of advantage. I think that it would be extremely hard on defendants if as a rule they were told at the end of the trial, "You have beaten the plaintiff, but because you have raised some points on which you have not succeeded you shall not have all the costs of the action." And it is obvious that it might lead to lengthening trials if counsel understood that unless they

(1) 48 L. T. (N.S.) 639.

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fought out every point the clients would not be allowed their costs even in a successful case. On the other hand, it is a useful rule that where there is a distinct issue on which the generally successful party has failed and that issue has really no immediate connection with those upon which the party has succeeded, then he ought not to have the costs of that issue which presumptively ought never to have been raised. As regards the fifth and sixth defences, though perhaps they might as well have been left out, still they were fair points to raise, and on the principle I have mentioned I do not think that the Defendants ought to be mulcted in costs, because succeeding on the whole they have not succeeded on them. But as regards the marking, that issue has been argued out, and there has been evidence directed to it, and I have held distinctly in favour of the Plaintiff on that point. I think that the Plaintiff ought to have the costs of that issue as against the general costs of the action.

Solicitors for Plaintiff: *Vallance & Vallance.*
Solicitors for Defendants: *Wilson, Bristows, & Carpmael.*

C. M.

KEKEWICH, J. 1888 *July* 28.

HALLOWS *v.* LLOYD.

[LIVERPOOL DISTRICT REGISTRY.]

[1887 H. 3261.]

Settlement—New Trustees—Non-disclosure of Incumbrances by retiring Trustee —Constructive Notice.

New trustees are not fixed with notice through retiring trustees of incumbrances affecting the trust estate, of which no notice appears amongst the trust documents, and the existence of which, though known to the retiring trustees, is not disclosed to them.

THIS was an action by beneficiaries to administer the estate of *J. Kilshaw,* who died in July, 1848, which now came on for hearing on further consideration, with a summons to vary the Chief Clerk's certificate, and calls for no report except on the point raised by the summons.

The testator by his will, dated the 12th of July, 1848, devised and bequeathed all his real and personal estate to *W. T. Kilshaw* and *A. Luya* upon trust, after the decease of his wife, to sell and convert the same into money and divide the residue into eight parts, one of such eight parts to be held in trust for his daughter, the Plaintiff *Elizabeth Hallows* (then *Elizabeth Kilshaw*), the wife of the Plaintiff *James Hallows*, for her life, with the usual power of appointment amongst her children, and, in default of appointment, for her children equally, with a gift over in the event of her having no children. The will contained no power to appoint new trustees.

The testator's widow died in October, 1848, and the trustees proceeded to realize the trust estate.

By an order made by the High Court of Chancery on the 28th of January, 1861, *G. Hardisty* was appointed a new trustee of the testator's will in the place of *A. Luya* deceased, and by the same order the trust estate was vested in the said *W. T. Kilshaw* and *G. Hardisty* jointly upon the trusts of the said will.

In 1867 *G. Hardisty* died; and by deed dated the 4th of November, 1886, and made between *W. T. Kilshaw* of the one part, and the Defendants *P. Lloyd* and *H. M. Smith* of the other part, after reciting (*inter alia*) that the said *W. T. Kilshaw* was desirous of being discharged from the trusts of the said will, *W. T. Kilshaw*, in pursuance of the powers conferred on him by the *Conveyancing Act*, 1881, appointed the Defendants to be trustees of the said testator's will in the place of himself and the said *G. Hardisty*, deceased, and the deed contained the usual declaration by *W. T. Kilshaw* vesting the trust estate in the Defendants upon the trusts of the said will.

The Plaintiffs were married on the 9th of May, 1854, and had had no issue.

The action was commenced in November, 1887, against the trustees, charging them with certain breaches of trust and claiming the administration of the testator's estate, the appointment of new trustees in the place of the Defendants, and consequential relief.

On the 3rd of March, 1888, judgment was obtained directing

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various accounts and inquiries, and the following facts appeared on the Chief Clerk's certificate.

Prior to the marriage of the Plaintiffs, articles for a settlement, dated the 8th of May, 1854, and made between the Plaintiff *James Hallows* of the first part, the Plaintiff *Elizabeth Hallows* (under her maiden name of *Elizabeth Kilshaw*) of the second part, and the said *W. T. Kilshaw* and one *J. Dowdall* of the third part, were executed, by which certain property was settled upon trusts (*inter alia*) for the Plaintiff *Elizabeth Hallows* for life for her separate use without power of anticipation. These articles expressly excepted from the settlements interests restricted to the life of the Plaintiff *Elizabeth Hallows*, but provided that the income to arise from such life interests should be applied in the same manner as the annual income of the property thereby settled was directed to be paid.

J. Dowdall died in May, 1855.

On the 15th of August, 1884, a letter was addressed by the Plaintiffs to the said *W. T. Kilshaw*, who was at that time the surviving trustee of the testator's will as well as the surviving trustee of the said articles of settlement, requesting him, out of the annual income to which they or either of them were or was entitled under the will of the said testator, to retain and pay the annual premiums in respect of a policy of insurance about to be effected by the said *Elizabeth Hallows* on her life for £1000, and also the interest which should from time to time become due to one *A. M. Burns* under or by virtue of an indenture of mortgage dated the 18th of August, 1884, and also to pay to *A. M. Burns* the deficiency, if any, which might arise in the sale of the hereditaments comprised in the said mortgage to the extent of £1000.

The mortgage of the 18th of August, 1884, was made between the Plaintiff *J. Hallows* of the first part, the said *W. T. Kilshaw* of the second part, and the said *A. M. Burns* of the third part, and thereby the Plaintiff *J. Hallows* conveyed by way of mortgage to *A. M. Burns* certain hereditaments to secure the repayment of a loan of £600 and future advances not exceeding £2000 with interest.

On the same day the Plaintiff *Elizabeth Hallows* signed a

memorandum addressed to *A. M. Burns* whereby, in consideration of the advances to her husband, she guaranteed the payment of all principal and interest to accrue due under the said mortgage not exceeding in the whole £1000; and did also charge the annual income to which she was entitled under the said will of her father with the payment of the said principal moneys and interest.

W. T. Kilshaw up to the date of the appointment of the Defendants as trustees of the said will of the said testator, and since then the Defendants up to the 30th of November, 1887, regularly paid *A. M. Burns* the interest on the moneys owing to him by quarterly instalments pursuant to the said letter of the 14th of August, 1884.

The Defendants had no knowledge of the marriage articles of 1854, and their existence was first disclosed to them in December, 1887.

The summons was taken out by the Plaintiffs, and raised the point whether the Defendants were personally liable to repay to the Plaintiffs the income which they, acting under the letter of the 15th of August, 1884, had paid to *A. M. Burns* prior to November, 1887.

Warmington, Q.C., and *W. D. Rotch*, for the Plaintiffs:—

Under the will the Defendants' trustees were entitled to receive the income of the Plaintiffs' one-eighth share, and must therefore justify their payment of it to a stranger. *W. T. Kilshaw* was not only a party to but also executed the marriage articles. He had therefore express notice of it, and at the date of his retirement he was the sole trustee of the will and of the marriage articles, and the Defendants must be taken to have had, through him, constructive notice of the articles. Further, by the articles *Elizabeth Hallows* fettered her life interest. She therefore incumbered it, and *W. T. Kilshaw* had the legal estate under the will, and also the equitable estate under the articles. Therefore, the title of *Elizabeth Hallows* as an incumbrancer on her life interest cannot be displaced by any subsequent incumbrance: *Newman* v. *Newman* (1).

(1) 28 Ch. D. 674.

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Neville, Q.C., and *R. N. Arkle*, for the Defendants:—

No notice of the marriage articles was amongst the trust documents handed over to the Defendants on their appointment as new trustees in 1886, and they were not bound to inquire of *W. T. Kilshaw*, the retiring trustee, whether he had received notice of any incumbrances: *Phipps* v. *Lovegrove* (1). There is no direct authority for saying that the Defendants are to be fixed with constructive or derivative notice of the marriage articles, because *W. T. Kilshaw* had express notice of them. In *Saffron Walden, &c., Building Society* v. *Rayner* (2) it was held that notice to a solicitor acting for trustees was not notice to the trustees, and it is submitted that the Defendants were, under the circumstances, justified in dealing with the income in accordance with the letter of the 15th of August, 1884, and that all parties claiming under the articles can only claim the same equities as *Elizabeth Hallows: Phipps* v. *Lovegrove* (3).

O. L. Clare, for *A. M. Burns*.

Warmington, in reply.

Barber, Q.C., and *Hughes*, *T. L. Higgins*, and *O. L. Clare*, for other parties interested in the testator's estate.

KEKEWICH, J.:—

This summons raises an important question which is not directly covered by authority, although I think it comes within well-settled principles. This lady, the Plaintiff *Elizabeth Hallows*, was a daughter of the testator, and was under his will absolutely entitled in possession during her life to the income of one eighth share of his residuary estate. In May, 1854, she marries, and executes a settlement, in the form of marriage articles, by which she agreed to fetter her life interest under her father's will in such a way that it became settled to her separate use without power of anticipation, but there was no actual assignment in words, and the legal ownership remained unchanged. She after-

(1) Law Rep. 16 Eq. 80. (2) 14 Ch. D. 406.
(3) Law Rep. 16 Eq. 80, 88, 91.

wards, in August, 1884, purported to create a charge in favour of a Mr. *Burns*, and he has been paid part of her income in discharge of his claim, and the question is, whether the Defendants, who are the present trustees of the testator's will, are entitled to credit in their accounts for the sums paid by them to Mr. *Burns*, or whether the Plaintiff is entitled to say, "Those payments are bad as against me, because they are an anticipation of my life interest." When she executed the charge *W. T. Kilshaw* was the sole surviving trustee of the testator's will. He was also a party to and executed the marriage articles. Therefore, as long as he remained a trustee of the testator's will, he clearly had direct notice of the marriage articles. But in November, 1886, he retired, and thereupon he, in exercise of the powers conferred by the *Conveyancing Act*, 1881, appointed the present Defendants new trustees of the testator's will, and the deed contained the usual declaration vesting the trust property in them. There is no proof that these two gentlemen had then, or until quite recently, any notice of the marriage articles, and they have paid to Mr. *Burns*, out of Mrs. *Hallows*' life income, the interest due to him under his charge, which was brought to their notice. This appears from the Chief Clerk's certificate. Mrs. *Hallows* now says that those payments were a breach of trust, because the charge was invalid, and they had notice, not personally, but through *W. T. Kilshaw*, the retiring trustee, of the marriage articles. This raises the important question, what are the duties of persons becoming new trustees of a settlement? Their duties are quite onerous enough, and I am not prepared to increase them. I think that when persons are asked to become new trustees, they are bound to inquire of what the property consists that is proposed to be handed over to them, and what are the trusts. They ought also to look into the trust documents and papers to ascertain what notices appear among them of incumbrances and other matters affecting the trust. But assuming they had done so in this case, it is admitted they would not by their search have found anything giving them any notice of these marriage articles. The non-existence of any notice of the marriage articles amongst the trust papers may possibly be explained by the fact that *W. T. Kilshaw* was himself the sole trustee of the will and of the

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articles. But Mrs. *Hallows* comes here as an incumbrancer, for she has by her marriage articles fettered the free disposition of her life interest, and I think she is in exactly the same position as any other incumbrancer. I see no distinction in principle between a lady who settles her life estate to her separate use without power of anticipation and a tenant for life who assigns his life estate by way of mortgage. I think the onus is on her to prove that she has a charge which entitles her to receive the income of her life estate for her separate use without power of anticipation, that she gave notice of that charge to the trustees of the testator's will, and that from the date of that notice they ought to have paid the income to her for her separate use in accordance with the charge. In my opinion she has failed to discharge that onus, and it is now too late to ask for any further inquiries. I think it would be creating a new duty for trustees, and casting a new liability on them, to hold that these trustees had through *W. T. Kilshaw*, the retiring trustee, derivative notice of the existence of these marriage articles. But it is said that *W. T. Kilshaw* had the legal estate under the will, and the equitable interest under the marriage articles, and therefore that the priority of Mrs. *Hallows* ought to prevail. The exact position of these trustees is difficult to define, but they were appointed under the *Conveyancing Act*, 1881, which provides (sect. 31, sub-sect. 5): "Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust." I think, therefore, that whether the trust property or the legal estate was vested in these gentlemen or not, they were from the date of their appointment trustees for all the purposes of the testator's will, and I see no reason why they should not have the same protection as if they had been the original trustees. The Act only amplifies and develops the common forms previously in use. As from the date of their appointment these trustees are entitled to the protection of the Court, and I hold that they are not liable for the sums which they have honestly paid away to Mr. *Burns* in pursuance of the letter of

the 15th of August, 1884, and without notice of the marriage articles.

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Solicitors for the Plaintiffs: *Nicholson & Graham*, agents for *Donnison & Edwards, Liverpool.*

Solicitors for the Defendants: *Venn & Co.*, agents for *Collins, Robinson, & Co., Liverpool.*

Solicitors for other Parties: *Wynne, Holmes, & Co.; Dixon & Syers, Liverpool; Peacock, Cooper, & Co., Liverpool.*

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HUMPHRIES & CO. *v.* THE TAYLOR DRUG COMPANY.

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[1887 H. 2687.]

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Aug. 9.

Infringement of Trade-mark—Discovery—Particulars—Practice.

In an action to restrain the infringement of his trade-mark, the Plaintiff alleged that the user of his trade-mark by the Defendant was calculated to induce, and had in fact induced, divers persons to purchase the goods of the Defendant as and for the goods of the Plaintiff. After delivery of defence denying Plaintiff's allegation:—

Held, on summons, that the Defendant was entitled to discovery of the names and addresses of the divers persons alleged to have been induced to purchase the goods of the Defendant as and for the goods of the Plaintiff, notwithstanding that such persons might be called at the trial as witnesses on behalf of the Plaintiff.

THIS was an action by *J. Humphries*, carrying on the business of a wholesale dealer in drugs and chemical preparations under the style of *J. Humphries & Co.*, to restrain the Defendant, *W. B. Mason*, carrying on a similar business under the style of *The Taylor Drug Company*, from using the word "*Herbaline*," which the Plaintiff alleged was a colourable imitation of his registered trade-mark "*Herbalin*," and from passing off the Defendant's goods as and for the Plaintiff's goods. The Plaintiff by his statement of claim alleged, paragraph 6: "The user by the Defendant in manner aforesaid of the word '*Herbaline*' is an infringement of the Plaintiff's said trade-mark, and the same is calculated to induce, and has in fact induced, divers persons to purchase the Defendant's preparation as and for the goods of the

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Plaintiff, and the Defendant has made considerable profit by selling goods, not being the Plaintiff's goods, under the name '*Herbaline.*' "

The Defendant by his statement of defence denied the infringement, and also specifically denied the statement in paragraph 6 of the statement of claim.

After delivery of the statement of defence, the Defendant took out a summons asking that the Plaintiff might be ordered to deliver to him particulars of the names and addresses of the divers persons alleged to have been induced to purchase the Defendant's preparation "*Herbaline*" as and for the goods of the Plaintiff as mentioned in paragraph 6 of the statement of claim.

This summons was adjourned into Court.

J. Cutler, for the summons:—

The defendant is entitled to these particulars to prevent his being taken by surprise at the trial.

J. G. Wood, for the Plaintiff:—

The Defendant is only entitled to the disclosure of facts material to the preparation of his defence, and not to the names of the persons by whom those facts will be proved. The names and addresses of persons can only be given when they fill some capacity towards both parties, and thus form a material portion of the facts. That is the distinction which runs through all the cases. Here, to tell the Defendant the names of these persons will be disclosing the Plaintiff's brief at the trial: *Eade* v. *Jacobs* (1); *Lyon* v. *Tweddell* (2); *Marriott* v. *Chamberlain* (3); *Carver* v. *Pinto Leite* (4); *Benbow* v. *Low* (5). If the Defendant should be taken by surprise at the trial he has a remedy.

KEKEWICH, J.:—

This summons raises a question of considerable importance, and notwithstanding the many authorities on the point and the

(1) 3 Ex. D. 335.
(2) 13 Ch. D. 375.
(3) 17 Q. B. D. 154.
(4) Law Rep. 7 Ch. 90.
(5) 16 Ch. D. 93.

exhaustive analysis to be found in Mr. *Bray's* book on Discovery, it is a question which is not easily decided.

In this case the Plaintiff sues for an infringement of a registered trade-mark; and I assume that if the Defendant has really used the word "*Herbaline*" in the manner alleged by the Plaintiff, he is liable to an action for having infringed the Plaintiff's mark "*Herbalin.*" The Plaintiff's case is twofold. He says, not only is the use by the Defendant of this trade-mark calculated to induce divers persons to buy the Defendant's goods as and for the Plaintiff's, but he also says that it has in fact induced divers persons to do so. The Defendant then asks, "Who are those divers persons?" The question I have to decide is, whether he is entitled to be told who those divers persons are. The Courts have uniformly endeavoured to prevent the plaintiff, or the defendant, as the case may be, from prying into the brief of their opponent or finding out what is to be the evidence which is to be produced at the trial. On the other hand, the Courts have uniformly said that the plaintiff, or the defendant, is entitled to be told any and every particular which will enable him to properly prepare his case for the trial, so that he may not be taken by surprise, or may, if he sees he has been wrong, give way at once. It seems to me that this case falls within the ruling of the Court in *Marriott* v. *Chamberlain* (1). The real question here is, has the Defendant induced divers persons to buy his goods as and for those of the Plaintiff? If it is once known to the Defendant that that has been done, that there have been such sales, that his goods have had that effect, he will, I presume, no further resist the injunction. If, on the other hand, he thinks that those are imaginary instances, or insufficient, he will be prepared to meet them at the trial and there will be no surprise. Mr. *Wood* truly says, that if a party is taken by surprise there is a remedy at the trial, that is to say, that the Court may allow the case to stand over for the purpose; but that is an inconvenient result, and the object of particulars is to get rid of that delay whenever it can be reasonably done. I cannot see any hardship on this Plaintiff being now ordered to give the names and addresses of the divers persons who have been induced to purchase the Defendant's

(1) 17 Q. B. D. 154.

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preparation as and for the goods of the Plaintiff, and in my opinion that must be done. The costs of this adjournment into Court will be the Defendant's in any event, and the particulars must be given within fourteen days.

Solicitors for Plaintiff: *W. & J. Flower & Nussey*, agents for *Killick, Hutton & Vint, Bradford.*

Solicitors for Defendant: *Seeley & Son.*

H. L. F.

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ADMINISTRATION—*Annuity charged on Real Estate—Tenant for Life and Remainderman—Corpus.*] Freeholds were granted to trustees to the use that the grantor and his wife should during their joint lives and the life of the survivor receive thereout an annuity or yearly rentcharge, and subject thereto to the use of M. in fee. M. entered into a covenant with the grantor and his wife for payment of the annuity:—*Held*, that, as between the tenants for life and remaindermen under the will of M., the annuity must be capitalized, and the burden borne in proportion to the value of their respective interests. —*Bulwer* v. *Astley* (1 Ph. 422), *Yonge* v. *Furse* (20 Beav. 380), and *Yates* v. *Yates* (28 Beav. 637) discussed and followed. *In re* MUFFETT. JONES *v.* MASON - - - - - - 534

2. —— *Enjoyment in Specie—Tenant for Life and Remainderman—Unauthorized Securities—Power to Trustees to retain existing Securities.*] A testator empowered his trustees at their discretion to continue all or any part of his personal estate in the state or investment in or upon which the same should be at his death, or otherwise to convert the same and to invest the proceeds in the names of the trustees in certain specified securities. At the death of the testator part of his personal estate consisted of securities not of a wasting nature and not specifically authorized.—In an action for the administration of the estate the Chief Clerk found that some of these securities were proper to be continued, and that others were proper to be called in:—*Held*, that the tenants for life under the will were entitled to receive in specie the income of those unauthorized securities which were retained, and which were not of a wasting nature. *In re* SHELDON. NIXON *v.* SHELDON - - - - - 50

3. —— *Insolvent Estate—Interest on Debt—Secured Creditor—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.] In the administration of an insolvent estate, a mortgaged property of the testator having been sold in the administration action, and the proceeds of sale paid into Court:—*Held*, that the mortgagee was entitled to have the proceeds of sale applied first in payment of interest on the mortgage debt down to the date of payment, and then in payment of principal, and to prove against the estate for the unpaid balance of principal, but that the amount of the proof could not exceed the amount of principal due at the date of the judgment in the action.—*In re Summers* (13 Ch. D. 136) distinguished. *In re* TALBOTT. KING *v.* CHICK - - 567

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BILL OF SALE—*Chattels stored in a Room as Security for Loan—Delivery of Key—Memorandum of Transaction—Pledge or Bill of Sale.*] In a pledge of goods it is not essential that the advance and delivery of possession should be contemporaneous. It is sufficient if possession be delivered within a reasonable time of the advance in pursuance of the contract to pledge.—In November, 1883, A. agreed to lend B. £2500 on the security of a valuable collection of prints and engravings. On the 19th of November, 1883, A. advanced B. £1250 on account of the loan, and it was arranged between them that the collection

BILL OF SALE—*continued.*
should be stored in a certain room, and on the 21st of December, 1883, B. wrote to A: "The collection was moved in to-day. L. has the key, which I place entirely at your disposal." On the 24th of December, 1883, A. advanced to B. the balance of the loan, and on the 11th of January, 1884, B. wrote to A.: "You having advanced to me the sum of £2500, I hereby authorize you to retain possession of my collection of engraved prints, now deposited by me in a certain room . . . the key of which room is at present in your possession or power; and I hereby acknowledge that you are to retain possession of such prints, &c., until the whole of the said sum of £2500, with interest at 5 per cent., has been repaid to you." B. died insolvent, and his administratrix disputed the validity of A.'s security on the ground that the letter of the 11th of January constituted a bill of sale, which was void under sects. 8 and 9 of the Bills of Sale Act, 1882:—*Held*, (1) that the transaction was one of pledge, independent of the letters, and that the Bills of Sale Act did not apply; and (2) that the pledge was perfected by delivery of the key to L., which amounted to constructive delivery of the goods to A. HILTON *v.* TUCKER - - - - - - 669

BOMBAY CIVIL FUND—45 *&* 46 *Vict. c.* 45, *s.* 5—*Mode of Trial.*] On an application to the Court of Appeal under the Bombay Civil Fund Act, 1882, to prescribe the manner of trial of a question alleged by the Applicant to arise between him and the Secretary of State for India as to the liability of the fund, the Court will not enter into any inquiry as to the nature of the Applicant's claim.—Form of directions as to the manner in which the question shall be tried. *In re* BOMBAY CIVIL FUND ACT. *Ex parte* PRINGLE C. A. 300

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meaning of the Building Societies Act, 1884, and that the action ought not to be stayed. MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY *v.* RICHARDS - - - - C. A. 372

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CHARITY—*continued.*

Under a Crown grant in 1589 an impropriate rectory in the city of London, and also the parish church and the advowson, were vested in trustees for the benefit of the parish, the vicar being always chosen by the parishioners. A vicarage-house was provided by a benefaction in a will dated in 1722, and had since been held by trustees on trusts for the benefit of the parish:—*Held*, that the advowson and house were "charity property" within the City of London Parochial Charities Act, 1883; and a petition presented, as a test case under sect. 10, by the several trustees for a declaration that they were not "charity property," was dismissed with costs, the Court refusing to sanction an arrangement between the various parishes affected by the decision for payment of the Petitioners' costs out of the charity estates.—"Special leave to appeal" under sect. 10 was also refused, on the ground that such leave should only be given where the Judge considered the question raised by the petition to be doubtful.—Dictum of Jessel, M.R., in *Attorney-General* v. *Webster* (Law Rep. 20 Eq. 483) dissented from.—*Attorney-General* v. *Parker* (1 Ves. Sen. 43; 3 Atk. 576) discussed. *In re* St. Stephen, Coleman Street. *In re* St. Mary the Virgin, Aldermanbury - - - - - 492

2. —— *Ancient Charity—Reparations, Ornaments, and other necessary Occasions of Parish Church—Surplus Rents—Erection of a Spire.*] An ancient charity was founded to provide for the reparations, ornaments, and other necessary occasions of the parish church. A new parish church had been erected, and a scheme was sanctioned by which the trustees were allowed to provide for the cost of a spire, as within the words "necessary occasions" of the parish church. *In re* Palatine Estate Charity - - 54

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COMPANY—*Director—Member—Statutory Company—Statutory Directors and Members—Transfer by Directors in order to escape Liability of Shares allotted as Qualification—Company formed by Act of Parliament for Public Benefit—Winding-up—Companies Act,* 1862 (25 *&* 26 *Vict. c.* 89), *s.* 199.] By a special Act of Parliament, passed in 1882, eight persons were incorporated into a company, and were made first directors thereof, "to continue in office until the first ordinary meeting held after the passing of the Act." The company was not registered under the Companies Act, 1862. No ordinary meeting of the company was ever held; and in 1887 an action was brought against the company to recover certain penalties payable under the Act. While the action was pending the eight first directors held meetings at which they allotted to themselves their qualifying shares, paid a call thereon, and applied the money in payment to one of them of preliminary expenses which under the Act were payable by the company, but which he

COMPANY—*continued.*

had paid or was liable to pay. Five of them then transferred their shares to another of them in consideration of money paid to the transferee. Judgment was given against the company in the action, and the Plaintiffs presented a petition for the winding-up of the company:—*Held*, by Kay, J., that the transfers of their shares by the five directors being for the purpose of escaping their liability, were fraudulent and void, and that therefore there were in fact eight members of the company, and the Court had jurisdiction under sect. 199 of the Companies Act, 1862, to make a winding-up order:—And *held*, by the Court of Appeal, in dismissing an appeal by the company, that the special Act imposed upon the eight persons incorporated thereby the statutory obligation of continuing directors and members of the company until the first ordinary meeting, and, no such meeting having been held, that such eight persons still continued members of the company, and consequently that the Court had jurisdiction to make a winding-up order.—Per Cotton, L.J.: The word "members" in sect. 199 of the Companies Act, 1862, does not necessarily mean "shareholders." *In re* South London Fish Market Company - - - **C. A. 324**

2. —— *Directors—Meeting—Notice—Informality.*] Application was invited by a company for 106,000 preference shares. At a meeting of all the directors, five in number, it was resolved not to allot till 14,000 shares were applied for; at a meeting of two (a quorum of) directors held shortly afterwards it was resolved that the previous resolution was cancelled, and that the shares then applied for, about 3000, should be allotted. The meeting was held at two o'clock, on a few hours' notice to two of the directors who did not attend, of whom one did not receive his notice till the next day, and the other gave notice he could not attend till three; the fifth director was abroad and no notice was sent to him:—*Held*, that the allotments made under the later resolution were void against the allottees. *In re* Homer District Consolidated Gold Mines. *Ex parte* Smith - - - - - **546**

3. —— *Reduction of Capital—Confirmation by Court—Discretion of Court—Preference Shares—Form of Minute to be registered—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26.] Upon a reduction of the capital of a company under the Companies Acts, 1867 and 1877, it is not essential that the reduction should be made equally or rateably, on all the shares, although, primâ facie, in the absence of any agreement to the contrary, the reduction ought to be made in that way.—But a contract made on the issue of any particular class of shares, such as preference shares, that that class of shares shall not be liable to reduction, will be valid. Whether, however, a company can by contract deprive itself altogether of the power of reducing its capital which is conferred by the Acts, *quære*.—The fact that, at the time when a class of preference shares was created, the articles of association of the company did not authorize any reduction of the capital, will not prevent the reduction of the amount of the preference shares, if a special resolution is previously

COMPANY—*continued.*

passed altering the articles by the insertion of a power of reduction.—Under sect. 11 of the Companies Act, 1867, the Court has a judicial discretion as to confirming resolutions for the reduction of the capital of a company, but the confirmation ought not to be refused unless there is something unjust or inequitable in the proposed reduction.—The minute to be registered on the confirmation by the Court of resolutions for the reduction of the capital of a company ought to shew, not only the amount of the capital as reduced, but also the amount at which it stood prior to the reduction.—The articles of association of a company, formed in 1864, under the Companies Act, 1862, provided that the directors might, from time to time, with the sanction of a special resolution previously given, increase the capital by the issue of new shares, and that any capital thus raised should be considered as part of the original capital, and should be subject to the same provisions as if it had been part of the original capital, except that it should be lawful for the company by special resolution to direct that the new shares should have such priority in respect of dividends as it should deem expedient. The articles did not contain any power to reduce the capital. In 1872 it was resolved to issue certain preference shares, "bearing interest at 8 per cent. per annum in perpetuity." In 1876 it was resolved to issue certain other preference shares, "entitling the holders to a fixed dividend at 6 per cent. per annum on the amount for the time being paid up in respect of such shares." In both cases it was provided that the preference shareholders should be entitled to attend the general meetings of the company, but that they should not be entitled in virtue of those shares to vote. Both classes of preference shares were issued and were paid up in full, as were also the ordinary shares. In 1885 a special resolution was passed, adding to the articles of association a clause, authorizing the directors from time to time, with the sanction of a special resolution, to reduce the capital by cancelling lost capital, or capital unrepresented by available assets. In April, 1888, special resolutions were passed for the reduction of the whole of the capital (including the preference shares) by one-fourth, on the ground that capital to that extent had been lost. A petition by the company for the confirmation of the resolutions by the Court was opposed by some of the preference shareholders, who contended that there was no power to reduce the amount of the preference shares, or that at any rate the amount of the dividend payable on those shares could not be reduced:—*Held*, that there was nothing in the bargain with the preference shareholders which prevented the reduction of their shares, and that there was nothing unfair or inequitable in the proposed reduction.—The resolutions were accordingly confirmed. *In re* Barrow Hæmatite Steel Company - - - - - - - **582**

4. —— *Registration—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 26, 27, 44—*Forwarding to Registrar Annual List of Members and Summary—Summary in Form D.—Default—Penalty—Summons before Metropolitan Magistrate—Misleading Return—Jurisdiction—Writ of Prohibi-*

COMPANY—*continued.*

tion—Rules of Supreme Court, 1883, *Order* XLIX., *r.* 4—*Crown Office Rules*, 1886, *r.* 81.] According to the true construction of the 26th section of the Companies Act, 1862, the forwarding to the Registrar of Joint Stock Companies of a list of members and summary which upon the face of them purport to satisfy the requirements of the Act, is not a sufficient compliance with that section unless such list and summary are in accordance with the facts; and a metropolitan police magistrate has jurisdiction upon a summons for penalties under sect. 27 to inquire into the truth or falsehood of the statements contained in the list and summary so forwarded, and is not precluded from hearing evidence on the complaint brought before him merely by the circumstance that the list and summary are in accordance with the company's register.—Such register is only primâ facie evidence of certain matters, and upon evidence that it contained fictitious entries the magistrate would be justified in disregarding such entries, and in treating a summary based upon them as false and misleading.—But questions of nicety as to the title to shares and the right to be on the register cannot properly be determined by a magistrate upon such a summons, and with reference to such questions he ought to accept the company's register as practically conclusive.—*Grosvenor Bank and Discount Company* v. *Boaler* (49 J. P. 774) followed. *In re* BRITON MEDICAL AND GENERAL LIFE ASSOCIATION [61

5. —— *Shares—Paid-up Shares—Winding-up—Agreement by Company to register Contract as to fully paid-up Shares—Payment in Cash—Issue of Shares at a Discount—Ultrà Vires—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] An agreement was entered into between an English manufacturing company and a French company, that the French company should render to the English company certain services, that in consideration of those services the English company should transfer to the French company or their nominees 1000 shares of £10 each in the English company to be credited as fully paid-up, with a provision that before they were issued the English company should procure the agreement to be registered. The services were rendered and the 1000 shares were allotted, as to 800 to the French company, and as to 200 to S., a nominee and a director of the French company. S. transferred the 200 shares to H., one of the directors of the English company, who afterwards transferred 100 of them to B., another of the directors. The agreement between the two companies was never registered; but B. and H. deposed that the directors had given their solicitor directions to register it, and that, until after the company had been ordered to be wound up, they believed that it had been registered. Certificates for the 1000 shares had been issued stating them to be fully paid-up:—*Held*, that the liquidator was not estopped from requiring B. and H. to pay calls as holders of shares on which nothing had been paid in cash, for that S., B., and H. knew all along that the shares had not been paid up in cash, which made the case wholly distinct from *Burkinshaw* v. *Nicolls* (3 App. Cas. 1004), where a transferee had in the ordinary course of business, and without anything to put

COMPANY—*continued.*

him on inquiry, bought shares the certificates of which stated them to be fully paid up, and was held entitled to rely on the certificates as evidence against the company and the liquidator that the shares had been fully paid up in cash.—Whether if S. had acquired the shares under such circumstances as to give him by estoppel a right to the shares as fully paid up he could have transferred this right to B. and H. who knew the true facts, *quære.*—*Held*, also, that the liquidator was not debarred from requiring B. and H. to pay calls, on the ground that the company, which had agreed to register the contract, was taking advantage of its own wrong by suing for calls which could not have been sued for if the contract had been registered; for that the right to sue for calls did not arise from the failure to register the contract, but from the fact of taking shares, and that the liability thence arising to pay up the shares in cash could only be taken away by a duly registered contract, and not by an agreement to register one.—Decision of Kay, J., affirmed.—*Held*, by Kay, J., as to another class of shares issued by the English company to B. and H. at a discount, that such issue was ultrà vires, a limited company having no power to issue shares at a discount: see *In re Almada and Tirito Company* (38 Ch. D. 415). *In re* LONDON CELLULOID COMPANY - C. A. 190

6. —— *Shares—Payment in Cash—Agreement to apply Debt owed but not payable by Company to Shareholder in payment of future Calls—Pending Petition to wind up—Fraudulent Preference—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 162—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] By the articles of association of a company the directors were empowered to receive from any member willing to advance the same all or any part of the moneys due upon his shares beyond the sums actually called for. K., a shareholder in, and formerly the managing director of, the company, on the 2nd of April, 1886, took an assignment from a creditor of the company of a debt of the company's payable by instalments, none of which were at that time due, and requested the directors to apply a sufficient part of the debt in paying in full the shares standing in his name, on which shares no call was at that time payable. The directors on the same day passed resolutions that the seal of the company should be affixed to the assignment, and that the debt assigned should be applied in paying up in full K.'s shares. Nothing further was done to carry the transaction into effect; there was no entry in reference to it in the books of the company other than the minute of these resolutions, nor was any contract registered as to the shares within sect. 25 of the Companies Act, 1867.—At the time of this transaction a petition for the winding-up of the company presented by K. on the 13th of March, was still pending. This petition was withdrawn on the 17th of April, but upon another creditor's petition presented meanwhile on the 5th of April, an order to wind up the company was made on the 20th of April:—*Held* (affirming the decision of Kay, J.), that as neither the debt purchased nor the calls unpaid were debts payable in præsenti the transaction of the 2nd of April, 1886, was not equivalent to, and would not support a plea of payment

COMPANY—*continued.*

in cash on the shares within the principles of *Spargo's Case* (Law Rep. 8 Ch. 407) and *White's Case* (12 Ch. D. 511); and therefore that K. was liable for calls made in the winding-up in respect of the shares.—*Ferrao's Case* (Law Rep. 9 Ch. 355) distinguished.—*Held*, also, that the transaction of the 2nd of April, 1886, was invalid as a fraudulent preference of K. over the other creditors of the company within sect. 164 of the Companies Act, 1867.—Per Cotton, L.J.: The 164th section of the Companies Act, 1862, cannot be construed as having now imported into it the 38th section of the Bankruptcy Act, 1883, as to mutual credit and set-off. *In re* Land Development Association. Kent's Case - - C. A. 259

7. —— *Shares—Preference Shares—Power to Issue—Articles of Association—Construction—Winding-up—Surplus Assets—Net Profits.*] The memorandum of association of a company provided that the capital of the company should consist of 500 £1000 shares. Article 4 of the articles of association gave power to create additional share capital, which might be issued as preference shares. By special resolution under a power in the articles it was resolved that the 500 £1000 should be divided into 50,000 £10 shares, and that the capital should be increased by the creation of 80,000 new £10 shares. The company by special resolution repealed the original articles and substituted others, one of which was to the same effect as the original article 4. When 100,000 £10 ordinary shares had been issued, the company resolved that the balance of the unissued capital, namely, £300,000, should be issued as 30,000 new £10 shares with a preferential dividend:—*Held*, by North, J., that the issue of such preferential shares by the directors was intrà vires.—The articles of association of a limited company provided that the entire net profits of each year, subject to providing a reserve, should belong to the holders of shares. After this preference shares entitling the holders to a fixed dividend were issued under a power in the articles. A statute enacted that the company should sell to another company its undertakings for a specified price, which left a large surplus after payment of liabilities and return of paid-up capital:—*Held*, by North, J., and by the Court of Appeal, that the balance of the purchase-money, after satisfaction of the liabilities of the company and the return of paid-up capital, was not profit belonging solely to the ordinary shareholders, but was divisible between the holders of ordinary and preference shares in proportion to the amounts paid up on the shares. *In re* Bridgewater Navigation Company - - - - C. A. 1

8. —— *Winding-up—Voluntary Winding-up—Provisional Liquidator—Rates due after Appointment of—Distress—Priority—Carrying on Business for Benefit of Winding-up—Companies Act*, 1862, *s.* 95.] Between the dates of the appointment of a provisional liquidator on a winding-up petition and of a subsequent resolution by the company for a voluntary winding-up, the overseers of a parish proceeded, without the leave of the Court, to distrain for rates which had become due for the current half-year in respect of the company's premises:—*Held*, by Kay, J., that the overseers were not entitled to the benefit of their

COMPANY—*continued.*

distress; and that, as the rates were due before the commencement of the winding-up—that is, the passing of the winding-up resolution: *Weston's Case* (Law Rep. 4 Ch. 20)—the overseers were not entitled to any priority in respect of them, and that an injunction ought to be granted to restrain them from proceeding with the distress:—*Held*, on appeal, that as the overseers' right of distress was defeated only by the appointment of the provisional liquidator, the case was one where if leave to distrain had been applied for it would have been granted, and that an injunction ought only to have been granted on the terms of the liquidators paying the rates. *In re* Dry Docks Corporation of London - - C. A. 306

9. —— *Winding-up — Compulsory Order—Voluntary Winding-up—Right of Creditor to Compulsory Order — Companies Act*, 1862, *s.* 145.] Sect. 145 of the *Companies Act*, 1862, which provides that the voluntary winding-up of a company shall be no bar to the right of a creditor to have it wound up by the Court if the Court is of opinion that his rights will be prejudiced by a voluntary winding-up, applies whether the voluntary winding-up commenced before or after the presentation of the petition.—A creditor presented a winding-up petition on the 17th of December, 1887. Three days before this the company had sent him an account shewing assets £2500, and liabilities £5000. On the 26th of January, 1888, the company passed an extraordinary resolution for winding-up. On the 28th of January the petition was ordered to stand over with liberty to the Petitioner to bring an action, which he did. On the 30th of April the voluntary liquidator withdrew his defence in the action on the ground that there were no assets. When the petition came on again, Kay, J., refused to make a winding-up order, but directed the voluntary winding-up to be continued under supervision. The petitioner appealed:—*Held*, on appeal, that this order must be affirmed, for that the only possible advantage of a compulsory order would be its relation back to the 17th of December, and that therefore the voluntary winding-up could not prejudice the rights of the creditor unless assets had been misapplied between the 17th of December, 1887, and the 26th of January, 1888, and that if the creditor relied on this, he ought to have made out at the hearing in the Court below a primâ facie case of misapplication of assets during that period. *In re* New York Exchange, Limited - - C. A. 415

—— Life insurance—Alteration of deed of settlement - - - - 571
See Insurance Company.

CONDITION—Invalidity - - - 116
See Will. 5.

CONDITIONS OF SALE - - - 110
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CONSIDERATION—Contract—Partial illegality
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CONTRACT—*Bond—Consideration partly illegal—Threats of Criminal Proceedings—Contract tending to affect the course of Criminal Proceedings.*] *A.* gave *B.* a bond to secure £3000, the consideration for which was that *A.* should be free from any legal proceedings or other conse-

CONTRACT—*continued.*

quences for having introduced *B.* to *X.*, through whom *B.* had lost money; and *A.* also gave *B.* a mortgage as a collateral security for the bond.—*A.* afterwards brought an action against *B.* to set aside these securities, alleging that he had executed them under duress from threats of criminal proceedings, and that the true consideration for them was an illegal one, *i.e.*, the abandonment of such criminal proceedings. *B.* denied the threat of criminal proceedings, and contended that the consideration was the compromise of a civil liability.—The evidence shewed that the securities were not executed under threats of criminal proceedings or under undue pressure, but that the consideration for them included stipulations that certain criminal proceedings pending against *X.* should be conducted in such a way either that *A.*'s name should not be mentioned, or that if mentioned *A.* should be exonerated from all blame in connection with the transaction:—*Held*, that the consideration was partly illegal, as containing stipulations with reference to the conduct of the pending criminal proceedings, by which the course of such proceedings might have been affected; and therefore that the bond and mortgage were obtained without good and sufficient consideration. LOUND *v.* GRIMWADE - - - - - - - - 605

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—— For paid-up shares—Registration - 190
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—— Married woman - - - - 482
See HUSBAND AND WIFE. 1.

COPYRIGHT—*Books—Novel, "Little Lord Fauntleroy," Dramatization of—Copyright, Infringement of*—5 & 6 *Vict. c.* 45, *ss.* 2, 3.] The Defendant dramatized the novel, "*Little Lord Fauntleroy*," and caused his play to be performed on the stage. The infringement of copyright complained of was that, for the purpose of producing the play, the Defendant made four copies of it, one for the Lord Chamberlain and three for the use of the performers, either in MS. or by the aid of a typewriter. Very considerable passages in the play were extracted almost verbatim from the novel. The Defendant claimed the right to make more copies if it should be necessary to enable him to give further representations of the play in *London* and elsewhere:—*Held*, that what had been done by the Defendant constituted an infringement of the Plaintiff's copyright, and that they were entitled to an injunction to restrain the Defendant from printing or otherwise multiplying copies of his play containing any passages from the Plaintiff's book:—*Held*, also, that all passages from the Plaintiff's book in the four copies must be cancelled. WARNE & CO. *v.* SEEBOHM - - 73

2. —— *Design—Previous Publication—Shewing Design—Sufficient Mark—Costs of successful Defendant of Defences in which he has failed—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 51.] The inventor of a design shewed it to and consulted his agent. The agent consulted another person, and also shewed it to two customers, and asked them for orders:—*Held*, that there had thus been a previous publication, and that subsequent registration of the design under the *Patents, Designs, and Trade Marks Act*, 1883, was therefore invalid.—A narrow coloured trimming was sold by the maker in pieces of many yards, having round them paper bands bearing "R[d]," and the registration number:—*Held*, that they were sufficiently marked within the *Patents, Designs, and Trade Marks Act*, 1883, s. 51.—Where the defendant succeeds generally he may have the costs of some of his defences on which he has not succeeded; but where he has raised a distinct issue and has failed, he ought not to have the costs of that issue. BLANK *v.* FOOTMAN, PRETTY, & CO. 678

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FALSE REPRESENTATION — *Mortgagor and Mortgagee—Valuation—Loss—Action by Mortgagee against Valuers—Negligence—Damages.*] An intending mortgagor, at the request of the solicitors of an intending mortgagee, applied to a firm of valuers for a valuation of the property proposed to be mortgaged.—A valuation at the sum of £3000 was sent in by the valuers direct to the mortgagee's solicitors, and the mortgage was subsequently carried out.—Default having been made in payment by the mortgagor, and a loss having resulted to the mortgagee, he commenced an action against the valuers for damages for the loss sustained through their negligence, misrepresentation, and breach of duty.—The Court being satisfied on the evidence that the Defendants knew at the time the valuation was made that it was for the purpose of an advance, and that the valuation as made was in fact no valuation at all:—*Held*, that, under the circumstances, the Defendants were liable on two grounds: (1), that they (independently of contract) owed a duty to the Plaintiff which they had failed to discharge; (2), that they had made reckless statements on which the Plaintiff had acted.—*George* v. *Skivington* (Law Rep. 5 Ex. 1) and *Heaven v. Pender* (11 Q. B. D. 503) followed.—*Peek* v. *Derry* (37 Ch. D. 541) discussed. CANN *v.* WILLSON - - - - - 39

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FRAUDS, STATUTE OF—*Sale of Building Materials—Interest in Land—Statute of Frauds, ss.* 4, 17—*Specific Performance—Damages.*] A contract for the sale of "the building materials" of a house—with a condition that all materials were to be taken down and cleared off the ground within two months, "after which date any materials then not cleared will be deemed a trespass and become forfeited, and the purchaser's right of access to the ground shall absolutely cease"—is a contract for the sale of an interest in or concerning land within sect. 4 of the Statute of Frauds, and accordingly, from the absence of any sufficient description in the contract of the vendor, avoided.—*Marshall* v. *Green* (1 C. P. D. 35) considered and distinguished:—*Held*, also, that the

FRAUDS, STATUTE OF—*continued.*
jurisdiction to give damages in substitution for, or in addition to specific performance, has not been extended to cases where specific performance could not possibly have been directed; and, accordingly, the contract having, from lapse of time, become at the hearing incapable of specific performance, the equitable doctrine of part performance (as avoiding the operation of the Statute of Frauds) did not enable the Plaintiff to obtain relief in damages. LAVERY *v.* PURSELL - 508

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HIGHWAY—5 & 6 *Will.* 4, *c.* 50, *s.* 67—*Drain—Dumb-well.*] A dumb-well, viz., a well into which waste water flows through a pipe and thence percolates into the soil, is not a "drain or watercourse" within the meaning of the Highway Act, 5 & 6 Will. 4, c. 50, s. 67, and cannot be made or used by the highway board in lands adjoining the highway. CROFT *v.* RICKMANSWORTH HIGHWAY BOARD - - - - - 272

HUSBAND AND WIFE—*Contract—Debts—General Power of Appointment—Testamentary Appointment—Appointed Fund—"Separate Property"—Married Women's Property Act*, 1882, *s.* 1, *sub-s.* 4.] An appointment by a married woman by will, in exercise of a general power of appointment by deed or will, or by will only, does not make the appointed property liable to engagements entered into with her on the credit of her separate estate prior to the 1st of January, 1883, the date of the commencement of the Married Women's Property Act, 1882, sect. 1 of the Act applying only to contracts made after that date.—In 1881 a married woman concurred with her husband in a mortgage, and thereby covenanted with the mortgagees, "with the intent to bind her separate estate," that she or her husband would pay the interest on the mortgage debt, and she assigned a life-policy to which, under the Married Women's Property Act, 1870, she was entitled for her separate use, to the mortgagees as security (with other property belonging to and assigned by the husband) for the mortgage debt and interest. Subsequently, by another deed dated in 1881, certain prior mortgage debts on the husband's property were transferred to the same mortgagees, the married woman being a party, with her husband, to the transfer, and covenanting, "with the intent to bind her separate estate," for payment by her or her husband of the interest on the several mortgage debts so transferred. The married woman joined in the mortgage and transfer only as surety for her husband.—By a separation deed, dated in 1884, the married woman covenanted with her husband to pay the interest on the several mortgage debts. At the dates of the three deeds she had, besides separate estate consisting of the said policy and some furniture, a general power of appointment by will over a fund. In 1887 she died, leaving her husband

HUSBAND AND WIFE—*continued.*

surviving, and having by will appointed the fund to her infant daughter absolutely at twenty-one or marriage:—*Held*, that the appointed fund was not liable to satisfy the married woman's obligations with the mortgagees, since (1) such obligations were incurred before the commencement of the Married Women's Property Act, 1882; and (2) the exercise of the power did not make the appointed property liable as assets of the appointor because such obligations were not strictly speaking debts:—*Semble*, even if the married woman's obligations had been incurred since the commencement of the Married Women's Property Act, 1882, the fund would not have been liable as "separate property" of the married woman within sect. 1, sub-sect. 4.—*Mayd* v. *Field* (3 Ch. D. 587) considered. *In re* ROPER. ROPER *v.* DONCASTER - - - - - 482

2. —— *Legacy to Wife—Husband's Debt—Executor—Retainer—Equity to a Settlement—Practice — Originating Summons—Rules of Supreme Court*, 1883, *Order* LV.*—Order declaring Settlement, Form of.*] A testator gave his residuary estate to his executors in trust for his wife for life, and after her death, in trust for sale and to divide the proceeds among his children equally. The testator left six children, one of whom, a daughter, had married in his lifetime, without a settlement. At the death of the testator in 1877 the daughter's husband was indebted to the testator in a sum exceeding the amount of the wife's share of residue. On the death of the testator's widow in 1886, the executors of the will claimed to retain the daughter's share for her husband's debt; but on the hearing of an originating summons, under Order LV., by the executors against the residuary legatees, including the daughter and her husband, the daughter asserted her equity to a settlement:—*Held*, that the executors had a right of retainer, but that the wife's equity preceded that right: and accordingly, having regard to the means and position in life of the husband and wife, the Court made an order on the summons declaring a settlement of a portion of the wife's share upon herself and her children, and directing the balance to be retained pro tanto against the debt due from the husband to the testator's estate and to be divided among the other residuary legatees, excluding the wife.—The doctrine of the executor's right of retainer of a wife's legacy for her husband's debt to the testator, and the wife's paramount equity to a settlement out of the legacy, discussed.—*Knight* v. *Knight* (Law Rep. 18 Eq. 487) questioned. *In re* BRIANT. POULTER *v.* SHACKEL - - - - - 471

3. —— *Married Women's Property Act* (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 1*—Death of Wife without disposing of Separate Personal Estate—Devolution—Title of Husband—Probate Rules*, 1887*—Costs.*] The Married Women's Property Act, 1882, has not altered the devolution of the undisposed of separate personalty of a married woman. Accordingly, on the death of a married woman without disposing of her separate personalty, the quality of separate property ceases, and the right of the husband to such undisposed of personalty accrues as if the separate use had never existed.—A married woman who had a power of appointment over certain trust funds, and was also possessed of separate estate her title to which had accrued before the Married Women's Property Act, 1882, died in 1887, having in the same year made a will, by which she exercised her power of appointment over the trust fund and appointed executors, but made no disposition of her separate property. Probate of the will was granted to the executors according to the altered practice introduced by the Probate Rules of 1887, *i.e.*, in the ordinary form without any exception or limitation:—*Held*, that on the death of the testatrix the title of her husband to her undisposed of separate estate accrued, and that the executors of her will became trustees of it for him, and not for the next of kin of the testatrix:—*Held* also, that the expenses of proving the will, including the probate duty, must be apportioned rateably between the appointed and undisposed of property in the same manner in which they would have been apportioned under a grant cæterorum before the change in the form of the grant: but that the costs of the proceedings in which the questions were determined must fall upon the undisposed of property, as they were occasioned by a contest between the husband and the next of kin. *In re* LAMBERT'S ESTATE. STANTON *v.* LAMBERT - - - 626

4. —— *Married Women's Property Act* (45 & 46 *Vict. c.* 75), *ss.* 1, 2, 19*—Interest of Married Woman in Fund comprised in Settlement on former Marriage—Absolute Reversion with Power to appoint by Will, or when discovert by Deed — Addition of Separate Use under Act of* 1882*—Right to a Transfer of the Fund without Release of the Power.*] By a marriage settlement made in 1878 a fund was settled upon trust to pay the income to the wife for life, and during her then intended coverture, such income was to be for her separate use, and after her death the fund was to be held in default of children in trust for such persons as the wife should during coverture by will, and when discovert by deed or will appoint, and in default, if the wife should survive the husband, in trust for her, her executors, administrators, and assigns.—The husband died in 1880. There was no issue of the marriage. The lady married again, after the Married Women's Property Act, 1882, and no settlement was made on that marriage. —Upon a summons taken out by her and her second husband to have it determined whether she could release the power of appointment by will given to her by the settlement, and call for a transfer of the settled property:—*Held*, that if the lady had come to the Court immediately before her second marriage she would have been entitled to have the settled property transferred to her, and that the Married Women's Property Act, 1882, had added the incident of separate use to her interest in such property, so that the lady and her husband were now entitled to have that property made over to them without any release by her of the power. *In re* ONSLOW. PLOWDEN *v.* GAYFORD - - - - - 622

—— Bequest to—Unity of person—Married Women's Property Act - - 148
See WILL. 6.

HUSBAND AND WIFE—*continued.*
—— Gift to wife while living apart from husband - - - - - 116
See Will. 5.

ILLEGALITY—Contract—Threat of criminal proceedings - - - - 605
See Contract.

INDEMNITY—Trustee—Payment of premiums on life insurance - - - 168
See Insurance—Life.

INFANT—*Discretionary Trust for Maintenance—Assignable Interest—Discretion of Trustees.*] A testator directed his trustees, after the death of his wife, to apply the income of his estate "in and towards the maintenance, education, and advancement of my children in such manner as they shall deem most expedient until the youngest of my said children attains the age of twenty-one years," and on the happening of that event he directed them to divide his estate equally among all his children then living. The testator left four children, two of whom at the death of the widow in 1884 were of age, and the youngest was in his seventh year. After the decease of the widow the trustees paid each of the adult children one-fourth of the income, and applied the other two-fourths for the benefit of the minors equally till 1886, when J. S. C., the eldest son, made an absolute assignment for value of all his interest under the testator's will to H. The trustees declining to pay one-fourth of the income to H. he took out a summons to have the construction of the will determined:—*Held* (by the Court of Appeal, affirming the decision of North, J.), that no child of the testator was entitled, prior to the attainment of twenty-one by the youngest of the testator's children, to the payment of any part of the income, and that the trustees were entitled to apply the income for the maintenance, education, or advancement of the children, including J. S. C., in their absolute discretion:—*Held*, also (affirming the decision of North, J.), that H. was entitled to no interest in the income except such moneys or property, if any, as might be paid or delivered or appropriated for payment or delivery by the trustees to J. S. C., and that the trustees could not pay or deliver to J. S. C. money or goods forming part of the income or purchased out of the income, for that such moneys and goods so paid or delivered, or appropriated to be paid or delivered, would pass by the assignment. *In re* Coleman. Henry *v.* Strong - - - C. A. 443

INSURANCE COMPANY—*Life Insurance—Deed of Settlement—Power to alter—Sale of Business.*] The deed of settlement of an unincorporated life assurance company contained no provision for the sale or transfer of its business. But it provided that the proprietors might alter, amend or repeal the laws, regulations and provisions of the company. Resolutions were passed with due formalities to take power to sell and transfer the business:—*Held*, that a sale and transfer of the business was intra vires. *In re* Argus Life Assurance Company - - - - 571

INSURANCE—LIFE—*Policy of Life Insurance—Payment of Premiums by Person not beneficial Owner—Trustee—Indemnity—Lien—Salvage.*] Under the provisions of a private estate Act the trustee of a term of years in certain settled estates, of which W. had been tenant for life, was bound to apply the rents of the estates, first, in the payment from time to time of the interest upon certain incumbrances existing before the passing of the Act, and subject thereto in the payment from time to time of the interest on sums to be raised by W. by mortgages created under the powers conferred by the Act, and of the premiums on policies of life assurance, constituting the collateral security for the repayment of those sums, the equity of redemption being reserved to W. The rents having become insufficient, the trustee, in order to save one of the policies from lapsing, paid a premium out of his own moneys. He did this without any request from the mortgagee or from the owner of the equity of redemption of the policy. The life insured having dropped, and the proceeds of the policy having been received by the mortgagee:—*Held*, that the trustee was not entitled to any lien on the proceeds in respect of the premiums which he had paid, he not being a trustee of the policy.—The right of a trustee to be indemnified out of his trust fund for money expended by him in its preservation, is strictly limited to the trust fund.—*In re Leslie* (23 Ch. D. 552) explained. *In re* Earl of Winchilsea's Policy Trusts - - - - 168

INTERROGATORIES - - - 316
See Practice. 4.

INVESTMENT—Settlement—"Real securities"
See Settlement. [660
—— Unauthorized securities—Enjoyment in specie - - - - 50
See Administration. 2.

JOINTURE—Fraud on power - - 648
See Power.

JURISDICTION—Costs as between solicitor and client - - - - 133
See Practice. 2.
—— Registration—Register of members of company - - - - 61
See Company. 4.

KEY—Delivery of—Pledge of goods - 669
See Bill of Sale.

LANDS CLAUSES ACT—*Costs of Trustee—Public Body—Settled Land taken under Statutory Powers—Payment of Purchase-money into Court—Petition for Transfer of Fund to Credit of Action to determine Beneficial Right—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 80.] Land subject to the trusts of a settlement was taken by the Metropolitan Board of Works under their statutory powers, and the purchase-money was paid into Court. An action (to which the trustee of the settlement was a defendant) had been brought to determine who was beneficially entitled to the property, and the persons who were found to be entitled petitioned for the transfer of the fund to the credit of the action. The petition was served on the trustee, and she appeared by counsel on the hearing:—*Held*, that

LANDS CLAUSES ACT—*continued.*
the trustee was entitled to appear, and that the Board must pay her costs. *In re* ENGLISH'S SETTLEMENT - - - - - 556

LEGACY—Invalid condition - - - 116
See WILL. 5.

LIEN—Policy of insurance—Payment of premiums - - - - 168
See INSURANCE—LIFE.

LIMITATIONS, STATUTE OF—*Solicitor—Trustee—Mortgage—Negligence.*] A mortgage was made through a solicitor and proved to be an insufficient security. More than six years afterwards an action was brought by the client against the executor of the solicitor claiming damages as for the wilful default of the solicitor:—*Held*, on the facts, that the client had approved of the mortgage, and that the solicitor merely did the legal part of the business and was not in the position of trustee, and therefore that the Statutes of Limitation applied.—A solicitor in advancing money on mortgage may be employed, (1) to invest in a particular mortgage; (2) to find securities to be approved by the client and then invest the money; (3) to find securities and invest the money, the client taking little or no part in the business. In an action for negligence against the solicitors, the Statute of Limitations is a good defence in the first case and also in the second case if the client has approved of the mortgage, no relation of trustee and cestui que trust then existing between them.—*Mare* v. *Lewis* (I. R. 4 Eq. 219) observed upon. DOOBY *v.* WATSON - - - 178

LIQUIDATOR—Provisional - - - 306
See COMPANY. 8.

LUNATIC—*Surplus Income of Lunatic—Allowance to Collaterals.*] It is not the duty of the Court to deal benevolently or charitably with the property of a lunatic, and applications for allowances out of the surplus income of a lunatic to poor collateral relations who have no legal claims upon him for provision are to be discouraged.—A lunatic, eighty-two years of age, whose next of kin were ten cousins, had, while sane, made small allowances to three of them, and after he was found of unsound mind those allowances were continued by the Court. By his report the Master recommended that weekly allowances of a larger amount should be made to these three cousins, and that weekly allowances should also be made to three others of the lunatic's cousins. There was evidence that all these persons were in very poor circumstances, and that some of them had difficulty in obtaining the necessaries of life, and that after payment of the proposed allowances there would still be a surplus income of 545*l.* per annum.—Upon an application by the committee that these allowances might be sanctioned by the Court:—*Held*, that there being nothing to shew that the lunatic would have done what the Court was asked to sanction, the mere fact that these collaterals were in humble circumstances and had difficulty in providing themselves with necessaries was not sufficient to justify the Court in granting the application, and that it must be refused. *In re* DARLING - - - - - C. A. 208

—— Trustee—Trustee Act - - - 189
See TRUSTEE ACTS. 1.

MAINTENANCE—Infant—Discretionary trust [443
See INFANT.

MARRIED WOMEN'S PROPERTY ACT 482, 622, [626
See HUSBAND AND WIFE. 1, 3, 4.

MASTER AND SERVANT—Agreement in restraint of trade - - - 520
See RESTRAINT OF TRADE.

—— Dismissal of servant for breach of duty 339
See PRINCIPAL AND AGENT.

MISDESCRIPTION—Conditions of sale - 110
See VENDOR AND PURCHASER.

MORTGAGE—*Foreclosure—Order for Delivery of Possession—Rules of Supreme Court*, 1883, *Order XVIII., r.* 2.] A summons for foreclosure asked for delivery of possession in the event of foreclosure. The usual foreclosure order was made without any direction as to delivery of possession. Default in payment having been made, the order for foreclosure was made absolute. The Plaintiff then moved in the action for an order on the Defendant to deliver up possession of the mortgaged property:—*Held* (affirming the decision of North, J.), that such an order ought to be made, and that the Plaintiff ought not to be put to bring a new action for the purpose of recovering possession. KEITH *v.* DAY - - - - - C. A. 452

2. —— *Mortgagee in Possession—Public-house—Account—Trade Profit.*] Mortgagees in possession of a public-house let the premises with a restriction that the tenant should take beer of their brewing and none other:—*Held*, that the mortgagees must account for such additional rent as might have been got if the premises had been let without restriction: but not for profit made by the sale of beer to the tenant. WHITE *v.* CITY OF LONDON BREWERY COMPANY - - 559

3. —— *Priority—Negligence—Possession of Title Deeds—Notice.*] A company held land under a building agreement from the corporation of London, under which separate leases of the houses were to be granted as they were built. In April, 1883, the company borrowed money from the Plaintiffs, and covenanted to mortgage the houses to them by demise when the leases were granted, and that in the meantime the premises comprised in the building agreement should be a security to the Plaintiffs. The building agreement was handed over to the Plaintiffs, but no notice of their security was given to the corporation of London. In February, 1886, leases of two of the houses were granted to the company, and immediately afterwards the company deposited them by way of equitable mortgage with B., J. & Co., who had no notice of the Plaintiffs' security:—*Held*, by Chitty, J., that as the Plaintiffs were not by their mortgage deed entitled to intercept the legal estate, and as with regard to land priority does not depend on notice, their not giving notice to the corporation was no evidence of negligence, and that they were not to be postponed to B., J. & Co.—*Held*, by the Court of Appeal, that although the giving notice to the corporation would probably have prevented the handing over the leases to the company, still, as notice is not requisite to complete a security on real estate, the omission to give such notice was not a neglect of duty by the Plaintiffs on the ground of which they ought to be postponed to the subsequent

MORTGAGE—*continued.*
equitable incumbrancers.—Per Fry, L.J.: The cases where a prior equitable mortgagee has been postponed on the ground of negligence are cases where he has taken no steps although he knew that the mortgagor had made default in performing his obligations, and his omission to take such steps has enabled the mortgagor to commit a fraud; but no case decides that he is to be postponed because he has not taken precautions against a future default by a mortgagor who has not yet, to the knowledge of the mortgagee, been guilty of default. Union Bank of London *v.* Kent - - - - - C. A. 238

4. —— *Redemption—Agreement for Lease by Mortgagor—Mortgagee's Refusal to adopt Agreement—Tenant's Right to redeem.*] Prior to the Conveyancing Act, 1881, a mortgagor, without the consent of his mortgagee, contracted in writing to grant T. a lease of the mortgaged premises for a term of years. T. entered into possession under the contract, and subsequently, on notice from the mortgagee, paid rent to him. The mortgagee having refused to concur in the lease to T.:—*Held* (affirming the judgment of Kekewich, J.), that T. was entitled to redeem the mortgage.—*Keech* v. *Hall* (1 Doug. 21) and *Pearce* v. *Morris* (Law Rep. 5 Ch. 227) considered and explained. Tarn *v.* Turner - - - C. A. 456

5. —— *Redemption—Covenant by Mortgagors to pay Principal and Interest—Assignment by Mortgagors of Equity of Redemption—Further Charge by Assignee in favour of Original Mortgagees—Insolvency of Assignee—Action by Mortgagees on Covenant by original Mortgagors—Right of original Mortgagors to Re-conveyance on Payment of original Mortgage Debt.*] A mortgagor who has absolutely assigned his equity of redemption in the mortgaged property, acquires, when sued by the mortgagee upon the covenant to pay principal and interest contained in the mortgage, a new right to redeem, and is entitled upon paying the mortgage money to a re-conveyance to himself, subject to any equity of redemption vested in any other person. And he is so entitled, even if after the assignment of the equity of redemption the assignee has further charged the property either to the original mortgagee or to some other person. In 1870 the Defendants mortgaged property to the Plaintiffs to secure £12,000 and interest, and entered into the usual covenants for payment of principal and interest. In 1872 the Defendants, for value, absolutely assigned their equity of redemption to A. B., and he covenanted to indemnify them against the £12,000 and interest. In 1875 A. B. further charged the property to the Plaintiff to secure £8000 and interest, covenanting that it should not be redeemable except upon payment of the £8000 as well as the £12,000. A. B. afterwards became insolvent, and the property having depreciated in value, the Plaintiffs brought an action against the Defendants on the covenant contained in the mortgage of 1870, to recover the £12,000 and interest. In a special case stated in the action:—*Held*, that the Plaintiffs were entitled to judgment for the £12,000 and interest, but only upon the terms that they reconveyed the property to the Defendants subject to such equity of

MORTGAGE—*continued.*
redemption as might be subsisting in any person or persons other than the Defendants themselves. Kinnaird *v.* Trollope - - - 636

—— Insolvent estate—Interest on debt - 567
See Administration. 3.

—— Negligence of solicitor - - 178
See Limitations, Statute of.

—— Valuation for purpose of advance—Misrepresentation - - - 39
See False Representation.

NEGLIGENCE—Mortgage—Priority - 238
See Mortgage. 3.

—— Solicitor—Statute of Limitations - 178
See Limitations, Statute of.

—— Valuation for mortgage - - 39
See False Representation.

NOTICE—Meeting of directors - - 546
See Company. 2.

—— New trustees—Incumbrances - - 686
See Trustee.

NOVEL—Copyright—Dramatizing novel - 73
See Copyright. 1.

PARALYTIC—Trustee—Trustee Act - 187
See Trustee Acts. 2.

PARTICULARS — Trade-mark — Discovery 693
See Trade-mark. 1.

PARTITION SUIT—*Application for Sale by Owner of less than half of Property—Discretion of Court—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 5.] Upon an application for a sale of property held by tenants in common, made by the owner of less than a moiety under sect. 5 of the Partition Act, 1868, the Court has a discretion, and is not bound to alter a sale, even if none of the other persons interested will undertake to purchase the Applicant's share. The onus is on the Applicant under sect. 5 to shew some good reason for ordering a sale of the property. Richardson *v.* Feary [45

PARTNERSHIP — *Dissolution — Receiver and Manager—Sale.*] Where articles of partnership expressly provide for a division of assets on dissolution the Court has, nevertheless, jurisdiction to direct a sale as a going concern, and will do so when that is the most beneficial mode of realization.—After dissolution of a partnership by notice pursuant to the articles the Court will, until a sale of the business as a going concern, appoint a receiver and manager for the purpose, in the meantime, of preserving the assets by carrying into effect existing contracts and entering into such new contracts as are necessary for carrying on the business in the ordinary way, but so as not to impose, by speculative dealing or otherwise, onerous liabilities on the partners. Taylor *v.* Neate - - - - - - 538

PATENT — *Provisional Specification — Complete Specification—"Distinct statement of the invention claimed"—Patents, Designs, and Trade Marks Act*, 1883, *s.* 5, *sub-ss.* 3, 4, 5.] The enactment in sect. 5, sub-sect. 5, of the Patents, Designs, and Trade Marks Act, 1883, that a complete specification must end with a distinct statement of the

PATENT—*continued.*
invention claimed, is directory only, and when letters patent have been granted, they will not be invalid because it has not been complied with.—A patent is not rendered invalid by the fact that the complete specification describes something different from anything specifically referred to in the provisional specification, provided, that what is so described comes within the nature of the invention described in general terms in the provisional specification.—Decision of Kekewich, J., affirmed. SIDDELL *v.* VICKERS - - C. A. 92

PAYMENT INTO COURT—Lands Clauses Act—Costs - - - - - 556
See LANDS CLAUSES ACT.

PERPETUITY—Will—Construction 155, 289
See WILL. 3, 7.

PETITION—Service out of jurisdiction - 424
See PRACTICE. 6.

PLEDGE—Chattels stored in room—Delivery of key - - - - - 669
See BILL OF SALE.

POLICY OF INSURANCE—Payment of premium by stranger - - - - 168
See INSURANCE—LIFE.

PORTION—Will—Construction - - 426
See WILL. 4.

POSSESSION—Order for—Foreclosure - 452
See MORTGAGE. 1.

POWER—*Jointuring—Corrupt Bargain inducing Appointment—Fraud on Power—Escrow.*] Under a power of appointing a jointure rent-charge not exceeding £200, the donee of the power appointed £200 a year to the jointress under a corrupt bargain with her to provide thereout for a stranger:—*Held*, that the appointment was a fraud on the power and void not merely pro tanto but altogether, although the jointress took some benefit under the appointment, it clearly appearing that the donee had no intention whatever of benefiting her and used the power merely as machinery to benefit the stranger.—If, however, it had appeared that the donee did intend to benefit the jointress to some extent the appointment might have been upheld pro tanto.—The doctrine laid down by Lord St. Leonards in his book on Powers (8th ed., pp. 610–612), and adopted in *Rowley* v. *Rowley* (Kay, 242, 259, 260), that there is a distinction between a power of jointuring and a power to appoint to children, discussed. WHELAN *v.* PALMER - - - - 648
—— Of investment - - - - 660
See SETTLEMENT.

PRACTICE—*Attachment—Rules of Supreme Court*, 1883, *Order* XLIV., *r.* 2.] An application in the Chancery Division for leave to issue a writ of attachment is not properly made by summons in Chambers, but should be made in open Court by motion. DAVIS *v.* GALMOYE - - C. A. 322

2. —— *Costs as between Solicitor and Client—Jurisdiction—Action against Trustees of a Charity Fund—Unjustifiable Litigation.*] The Court of Chancery formerly had, and the High Court of Justice now has in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client.—Whether the High Court has the same power in matters of common law jurisdiction, *quære.*—*Cockburn* v. *Edwards* (18 Ch. D. 449) questioned.—*Mordue* v. *Palmer* (Law Rep. 6 Ch. 22) approved.—An action was brought by the vicar and churchwardens of a parish to recover from the Defendants a fund of small amount which had been handed over to them upon trust for a charitable purpose connected with the parish, but, as the Plaintiffs alleged, upon a condition which had become incapable of fulfilment. The Plaintiffs failed to make out their case. The Court, in dismissing the action, being of opinion that it had been brought wholly without justification, ordered the Plaintiffs to pay the costs of the Defendants as between solicitor and client; and the Court of Appeal refused to interfere with the judgment. ANDREWS *v.* BARNES - - - C. A. 133

3. —— *Court Fees—Order as to Supreme Court Fees*, 1884, *Schedule* (*Item* 72).] The Court fees on a trustee's periodical accounts are taken on a percentage on the amounts found from time to time to have been received, not on the amounts found due.—Where an account is lodged and no further step is taken no Court fee is payable. Where an account is lodged and partly proceeded with but not certified, the Court fee is to be proportionate to the work done. *In re* CRAWSHAY. DENNIS *v.* CRAWSHAY - - - - 552

4. —— *Interrogatories—Rules of Supreme Court*, 1883, *Order* XXXI. *r.* 1.] The Plaintiff, as executrix of A. M., sued the executor of H. M., alleging that H. M. had received £6000 in trust for A. M., had invested it in securities producing at least £5 per cent. per annum, and applied the interest to his own purposes. The Plaintiff claimed payment of the £6000 with interest at £5 per cent. The Defendant professed ignorance as to the matters alleged, and set up several alternative defences: that H. M. had not received the £6000; that if he had, he paid it to A. M.; that if he received it A. M. agreed that he should retain it for his own use as a gift from her; that if he received it, it was agreed between him and A. M. that he should retain it in satisfaction of a claim which he had against her; that A. M. was at her death indebted to H. M. in an amount exceeding the £6000. The Plaintiff delivered interrogatories for the examination of the Defendant. By interrogatory 18 he asked particulars as to the way in which the £6000 had been invested by H. M., and what was the rate of interest on the investments, and how the income had been disposed of. By interrogatory 23 he asked whether the Defendant was not the brother of H. M., and whether during the period of the transactions referred to in the statement of claim the Defendant had not been the solicitor and agent of H. M., and lived with him, and acted as his confidential agent with respect to his property, and become acquainted with all his affairs. The Defendant, in answer to interrogatory 18, stated that H. M. had invested the £6000, and applied the income to his own purposes, and declined to answer further, and he declined to answer interrogatory 23 at all. North, J., ordered him to put in a further answer to both interrogatories:—*Held*, on appeal, that as the Plaintiff was not seeking to follow the investments of the £6000, the Defendant was not bound

PRACTICE—*continued.*

to give the particulars of such investments; but that as the Defendant did not admit the receipt of £5 per cent. interest, he was bound to answer as to the amount of interest that had been received, as it would enable the Court at the hearing to make an immediate decree for payment of principal and interest if the Plaintiff established the trust.—*Parker* v. *Wells* (18 Ch. D. 477) distinguished.—But *held*, by Fry and Lopes, L.JJ. (dissentiente Cotton, L.J.), that the Defendant was not bound to answer interrogatory 23, for that an interrogatory asking in substance whether the Defendant had not been in such a position that he must know whether the allegations in the statement of claim were true or false, did not relate to any matter in question in the cause within the meaning of Order XXXI., r. 1. *In re* Morgan. Owen *v.* Morgan - - C. A. 316

5. —— *Service on Defendant out of the Jurisdiction—Vacation Judge—Ex parte Order—Rules of Supreme Court*, 1883, *Order XII., r.* 30; *Order LXIII., r.* 12; *Order LXX., r.* 2.] Order LXIII., r. 12, which provides that no order made by a Vacation Judge shall be reversed or varied except by a Divisional Court or the Court of Appeal or the Judge who made the order, does not apply to an ex parte order, and after the close of the Vacation an application to discharge it must be made to the Judge to whose Court the cause is attached, and not to the Court of Appeal in the first instance.—An order was made for substituted service in England, of a writ and notice of motion for injunction, on a person resident abroad. He did not enter an appearance, but appeared by counsel on the motion for the injunction, filed affidavits, and argued the case on the merits.—*Held*, that the proper course for the Defendant to have taken was to have applied at once to the Judge to whose Court the cause was attached to discharge the order for service, and that not having done so, but filed affidavits, appeared by counsel, and argued the case on the merits, he could not now complain of the order for service. Boyle *v.* Sacker [C. A. 249

6. —— *Service out of Jurisdiction—Petition under Trustee Relief Act for Payment of Money out of Court—Rules of Supreme Court*, 1883, *Order XI., r.* 1.] *Held*, by North, J., that the Court has no jurisdiction to allow service out of the jurisdiction of a petition under the Trustee Relief Act for payment of money out of Court.—*In re Gordon's Settlement Trusts* (W. N. 1887, p. 192) not followed.—It appearing that the order sought by the petition was only for carrying into full effect an order which had recently been obtained by the Respondents, the Court of Appeal, without deciding that leave was necessary, gave leave to serve the petition on the solicitors who had presented the former petition, and who were willing to accept service. *In re* Jellard [C. A. 424

7. —— *Striking out Statement of Claim—Frivolous and oppressive Action—Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27), *s.* 26)—*Concealed Fraud.*] The Plaintiff sued in the Chancery Division to recover estates as heir-at-law of J. L., who died intestate, seised in fee and in possession thereof, in 1816. The Plaintiff alleged that on

PRACTICE—*continued.*

J. L.'s death J. T. wrongfully took possession; that the solicitors of J. L. knew the address of the heir-at-law, who resided in America, and were about to communicate with him, but that J. T. persuaded them not to do so, and to deliver to him the deeds and evidence shewing J. L.'s title, including a deed of compromise by virtue of which he had obtained possession; that by reason of the premises the heir and the persons claiming under him had remained ignorant of their title till 1886, and that the fraud could not with reasonable diligence have been discovered sooner.—The Plaintiff had previously commenced an action in the Queen's Bench Division to recover the same estates, the statement of claim in which merely alleged his title as heir-at-law, but contained no allegations of fraud to take the case out of the Statute of Limitations. The Defendants applied to strike it out, as shewing no cause of action. The Plaintiff then, after the regular time for amendment, applied for leave to amend, and exhibited a proposed amended statement of claim containing allegations of concealed fraud. The Queen's Bench Division refused leave to amend, and struck out the statement of claim and dismissed the action, on the ground that no cause of action was shewn. The Plaintiff then commenced this action, in the Chancery Division, the allegations of fraud in the statement of claim being nearly the same as those in the proposed amendments in the Queen's Bench Division, but meeting some of the points in which those amendments had been observed upon by the Judges as defective. The Defendants moved that the statement of claim might be struck out and the action dismissed:—*Held* by Stirling, J., that the inducing the solicitors to deliver the deeds to J. T. was a concealed fraud, which would prevent the operation of the statute, and that, the Court not being satisfied on the evidence that the allegations of fraud were fictitious, the action must be allowed to proceed:—*Held* by the Court of Appeal that, independently of the General Orders, the Court has jurisdiction to stay vexatious actions; that the conclusion to be drawn from the whole of the materials before the Court was that the allegations of fraud were made without any reasonable ground, and that the statement of claim, assuming its allegations if true to shew a cause of action, ought to be struck out and the action dismissed as an abuse of the process of the Court. Lawrance *v.* Lord Norreys - - C. A. 213

8. —— *Writ of Assistance—Rules of Supreme Court*, 1883, *Orders XLVII., XLVIII.*] Although for the purpose of recovering land the old writ of assistance has been superseded by the writ of possession (Order XLVII.) the writ may still be issued for the purpose of recovering possession of and preserving chattels which have been ordered to be delivered to a receiver. Wyman *v.* Knight [165

—— Bombay Civil Fund—Mode of trial - 300
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—— Mortgage—Foreclosure - - 452
See Mortgage. 1.

—— Particulars—Trade-mark - - 693
See Trade-mark. 1.

PRECATORY TRUST - - - 253
See WILL. 8.

PREFERENCE SHARES—Reduction of - 582
See COMPANY. 3.

PREFERENTIAL DUES—Railway—Docks 524
See RAILWAY COMPANY.

PRINCIPAL AND AGENT—*Master and Servant—Managing Director—Profit made by Agent—Commission—Dismissal of Servant for Breach of Duty—Salary for current Period.*] The promoter of the Plaintiff company agreed with the Defendant that he should be employed as managing director of the intended company for five years at a yearly salary. By the articles of association it was provided that the Defendant should be managing director for five years at the yearly salary mentioned in the agreement, payable quarterly. Afterwards the company by a written instrument adopted the agreement between the promoter and the Defendant.—The Defendant, on behalf of the company, contracted for the construction of certain fishing-smacks, and, unknown to the company, took a commission from the shipbuilders on the contract. Several months afterwards the Plaintiff company at an extraordinary meeting passed a resolution dismissing the Defendant from his office on the ground of other alleged acts of misconduct, which they were not able to substantiate in the action: being at that time ignorant of his receipt of the commission from the shipbuilders.—The Defendant was a shareholder in an ice company and a fish-carrying company, which paid, in addition to the ordinary dividends, bonuses to shareholders who were owners of fishing-smacks and who employed the companies in supplying ice and carrying for them. The Defendant employed these companies in respect of the Plaintiffs' smacks, and received bonuses as if the smacks were his own.—The Plaintiff company brought an action against the Defendant for an account of commissions and bonuses received by him, and for damages for alleged breaches of duty: and the Defendant counter-claimed for wrongful dismissal and for the salary for the quarter which had expired before his dismissal:—*Held* (reversing the decision of Kekewich, J.), that the receipt of a commission from the shipbuilding company was good ground for dismissal, although it was not discovered till after the dismissal had taken place; and although it happened several months previously, and might have been an isolated act:—That the Defendant must account to the Plaintiffs for the bonuses received from the ice and carrying companies, as they had been paid in respect of the Plaintiffs' smacks; although the Plaintiffs could not themselves have received the bonuses, not being shareholders of the companies:—That the contract between the Plaintiffs and the Defendant was contained in the agreement between the promoter and the Defendant as adopted by the company, and was not modified by the articles of association; that the salary was consequently payable yearly and not quarterly; and therefore that the Defendant having been dismissed for misconduct was not entitled to any part of the unpaid salary for the current year of his service.—If the Plaintiff company had not formally adopted the agreement by a separate instrument, *quære*, whether the articles might not have been taken as evidence that the parties had agreed to a modification of the agreement by making the payment of the salary quarterly. BOSTON DEEP SEA FISHING AND ICE COMPANY *v.* ANSEL [C. A. 339

PRINCIPAL AND SURETY—*Crown Debts—Administration—Priority.*] A surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of his principal's estate. *In re* LORD CHURCHILL. MANISTY *v.* CHURCHILL - 174

PRIORITY—Debts of Crown—Payment by surety
See PRINCIPAL AND SURETY [174

—— Mortgage—Negligence - - 238
See MORTGAGE. 3.

—— Wife's legacy—Retainer by executor 471
See HUSBAND AND WIFE. 2.

PROFITS—Net profits—Preference shares 1
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PUBLIC-HOUSE—Mortgagee in possession—Profits - - - - 456
See MORTGAGE. 4.

PUBLICATION—Design - - - 678
See COPYRIGHT. 2.

QUALIFICATION—Director - - 324
See COMPANY. 1.

RAILWAY COMPANY—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48)—"*Facilities*" *for receiving, forwarding, and delivering of Traffic—Preferential Dock Dues—Railway Commissioners—Jurisdiction—Prohibition.*] The provisions of the Railway and Canal Traffic Act, 1854, sect. 2, that railway (and canal) companies shall provide all reasonable facilities for receiving, forwarding, and delivering traffic, and that "no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever"—are limited to the conveyance and transport of traffic on a railway (or canal), and do not give jurisdiction to the Railway Commissioners, on complaint under the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 6, to restrain a company owning two separate docks twenty miles apart, and a line of railway connected with one of such docks (and thereby constituted a railway company within the Railway Companies Amendment Act, 1867), from charging preferential dock dues to the prejudice of one shipowner using the docks, not connected with the line of railway, in favour of other shipowners.—*West* v. *London and North Western Railway Company* (Law Rep. 5 C. P. 622) discussed and explained. EAST AND WEST INDIA DOCK COMPANY *v.* SHAW, SAVILL, AND ALBION COMPANY - - - - - 524

RATES—Winding-up of company—Distress 306
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RECEIVER—Partnership—Dissolution - 538
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RECTORY — Trust for parishioners — London Parochial Charities Act - - 492
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REDEMPTION—Assignment of equity of redemption - - - - - 636
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—— Right of tenant to redeem - - 456
See Mortgage. 4.

REDUCTION OF CAPITAL - - - 582
See Company. 3.

REGISTRATION—Contract for paid-up shares
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—— Members of company - - - 61
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—— Trade-mark - - - - - 29
See Trade-mark. 2.

REMOTENESS—Will—Construction 155, 289
See Will. 3, 7.

RESTRAINT OF TRADE—*Agreement.*] Agreement by B.—on entering for a term of three years the service of A., a tailor—not to enter the service or employ of any other person or enter into any engagement or be concerned or interested in carrying on either on his own account or otherwise, "any business whatsoever within the distance of one mile from —— during the continuance of the said term or afterwards during the further period of two years," without A.'s consent in writing.—On motion by A. to restrain B. from setting up as a tailor within the prescribed limit in breach of the agreement:—*Held*, that the agreement was void, and that effect could not be given it by rejecting the general restraint, and limiting the agreement for the purposes of the action to carrying on the business of a tailor thereby sought to be restrained. Baker *v.* Hedgecock - - - - - - 520

RETAINER—Right of — Wife's legacy—Husband's debt - - - - 471
See Husband and Wife. 2.

RULES OF CROWN OFFICE, 1886, r. 81 - 61
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RULES OF SUPREME COURT, 1883, Order XI., r. 1 - - - - - 424
See Practice. 6.

—— **Order XII., r. 30** - - - 249
See Practice. 5.

—— **Order XVIII., r. 2** - - - 452
See Mortgage. 1.

—— **Order XXV., r. 4** - - - 213
See Practice. 7.

—— **Order XXXI., r. 1** - - - 316
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—— **Order XXXVII.** - - - 165
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—— **Order XLIV., r. 2** - - - 322
See Practice. 1.

—— **Order XLVIII.** - - - - 165
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—— **Order XLIX., r. 4** - - - 61
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RULES OF SUPREME COURT, 1883—*continued.*
—— **Order LXX., r. 2** - - - 249
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See Husband and Wife. 1, 3, 4.

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See Principal and Agent.

SERVICE—Out of jurisdiction - 249, 424
See Practice. 5, 6.

SETTLED LAND ACT (45 & 46 *Vict. c.* 38), *ss.* 58, *subs.* 1 (*ix.*), 59, 60, 63—*Direction for Postponed Sale — Contingent Interest —Tenant for Life — Persons entitled concurrently—Trust for Accumulation.*] Devise in 1874 of real estates to trustees upon trust for sale, but with a direction that testator's M. estate should not be sold until the expiration of twenty-one days from the date of his will; for the purpose of transmission the real estate to be impressed with the quality of personalty from the time of his death; the rents of the real estates previous to conversion to be applied in the same manner as the income of the proceeds of sale; after payment of debts and legacies the surplus proceeds of sale to be invested and (in the events that happened) the capital to be held in trust for all the testator's children who being sons should attain twenty-five, and being daughters should attain twenty-five or marry under that age, and if more than one in equal shares. The trustees were empowered to apply the whole, or such part as might be required, of the annual income of the share to which any child might be entitled in expectancy for his or her maintenance or education, with a direction to accumulate the unapplied surplus of the income in augmentation of the share whence such income should have proceeded, and eventually to devolve in the same manner. Death of testator in February, 1888, leaving six children, two sons who had attained twenty-one, but were under twenty-five; and three sons and one daughter, who were infants:—*Held*, that the children could not exercise the powers of tenants for life over the M. estate, and that that estate could not be sold either under sects. 63, 58, or 59.—Per North, J.: There was no trust or direction for sale within sect. 63.—Costs allowed out of the settled property. *In re* Horne's Settled Estate [C. A. 84

SETTLEMENT—*Trust to invest on "Real Securities" — Contributory Mortgage of Freeholds—Breach of Trust.*] In the absence of an express power, it is a breach of trust for trustees, having an ordinary power to invest on "real securities," to invest on a contributory mortgage of freeholds. WEBB *v.* JONAS - - - - 660

—— Trustees—Liability - - - 686
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SOLICITOR—Negligence—Statute of Limitations
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3 & 4 Will. 4, c. 27, s. 26—*Limitations* - 213
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5 & 6 Will. 4, c. 50, s. 67—*Highways* - 272
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5 & 6 Vict. c. 45, ss. 2, 3—*Copyright* - 73
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—— —— s. 95 - - - - 306
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—— —— s. 145 - - - - 415
See COMPANY. 9.

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31 & 32 Vict. c. 40, s. 5—*Partition* - 45
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36 & 37 Vict. c. 48—*Regulation of Railways*
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38 & 39 Vict. c. 77, s. 10—*Judicature Act* 567
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40 & 41 Vict. c. 26—*Companies* - - 582
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45 & 46 Vict. c. 38, ss. 58, sub-ss. 1 (ix.), 59, 60, 63—*Settled Land* - - - 84
See SETTLED LAND ACT.

45 & 46 Vict. c. 45, s. 5—*Bombay Civil Fund*
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45 & 46 Vict. c. 75, s. 1, sub-s. 1—*Married Women's Property* - - - 626
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—— —— ss. 1, 5 - - - - 148
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46 & 47 Vict. c. 36, ss. 5, 10—*City of London Parochial Charities* - - 492
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46 & 47 Vict. c. 57, s. 5, sub-s. 3, 4, 5—*Patents, Designs, and Trade-marks* - 92
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—— Enjoyment in specie—Unauthorized securities - - - - - 50
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TENANT FOR YEARS—Right to redeem mortgage - - - - - 456
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TESTAMENTARY APPOINTMENT — Married woman—Separate estate - - 482
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THREATS—Criminal proceedings—Illegal considerations - - - - 605
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TITLE DEEDS—Possession of mortgage - 238
See Mortgage. 3.

TRADE-MARK—*Infringement—Discovery—Particulars—Practice.*] In an action to restrain the infringement of his trade-mark, the Plaintiff alleged that the user of his trade-mark by the Defendant was calculated to induce, and had in fact induced, divers persons to purchase the goods of the Defendant as and for the goods of the Plaintiff. After delivery of defence denying Plaintiff's allegation:—*Held*, on summons, that the Defendant was entitled to discovery of the names and addresses of the divers persons alleged to have been induced to purchase the goods of the Defendant as and for the goods of the Plaintiff, notwithstanding that such persons might be called at the trial as witnesses on behalf of the Plaintiff. Humphries *v.* The Taylor Drug Company 693

2. —— *Registration—"Fancy Word"—Patents, Designs and Trade Marks Act*, 1883, *s.* 64, *sub-s.* 1 (*c*). W. registered the word "Reversi" as a trade-mark for "a game somewhat analogous to draughts." The word was the name of a game of cards popular in France in the 16th century. In the rules of W.'s game the word "reverse" frequently occurred, and the game depended on each player reversing or turning over his adversary's counters. A. brought out a similar game under the name of "Annex," and on the labels of the boxes in which he sold it, he added to the name "a game of reverses." W. brought an action to restrain A. from infringing the trade-mark, and A. applied to remove the trade-mark from the register. Kay, J., refused the application to vary the register, and granted an injunction to restrain A. from using in his labels the word "reverses," or any colourable imitation of "Reversi":—*Held*, on appeal, that as the word "Reversi" would suggest to an ordinary Englishman the idea that the game had something to do with reversing, it was not a word which obviously could not have any reference to the character of the article: *In re Van Duzer's Trade-mark* (34 Ch. D. 623, 639); that it therefore was not a "a fancy word," and ought to be removed from the register:—*Held*, also, that the use of the words "a game of reverses," which were a fair description of the nature of the game, did not shew any design on the part of A. to pass off his game as that of W., and that an injunction ought not to have been granted.—Per Fry, L.J.: A name which has been given to a new article, and which is the only name by which it is known, cannot be a "fancy word" as regards that article. Waterman *v.* Ayres. *In re* Waterman's Trade-mark - - C. A. 29

TRUSTEE—*Settlement—New Trustees—Non-disclosure of Incumbrances by retiring Trustee—Constructive Notice.*] New trustees are not fixed with notice through retiring trustees of incumbrances affecting the trust estate, of which no notice appears amongst the trust documents, and the existence of which, though known to the retiring trustees, is not disclosed to them. Hallows *v.* Lloyd - - - - - - 686

—— Appointment—Trustee Act - 187, 189
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—— Costs—Charity fund - - - 133
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—— Costs—Lands Clauses Act - - 556
See Lands Clauses Act.

—— Costs—Trustee Relief Act - - 303
See Trustee Relief Act.

—— Investment—"Real securities" - 660
See Settlement.

—— Maintenance of infant—Discretion - 443
See Infant.

TRUSTEE ACTS—*Lunatic Trustee—Appointment of new Trustees in place of lunatic Trustee and Person out of Jurisdiction—Vesting Order as to Mortgage Debt and Stock*—13 & 14 *Vict. c.* 60, *ss.* 3, 5.] The property comprised in a settlement consisted of money lent upon a mortgage of freeholds vested in the two surviving trustees, and of a sum of consols standing in their names. One of these two surviving trustees was a lunatic, and the other was resident out of the jurisdiction; and under a power in the settlement two persons were appointed new trustees in their places. Upon a petition by these two new trustees and by all the beneficiaries praying for an order reappointing the new trustees as trustees of the settlement, and vesting in them the trust property:—The Court declined to reappoint the new trustees, but under sect. 3 of the Trustee Act, 1850, vested the lands subject to the mortgage in the new trustees, and under sect. 5 of the same Act vested the mortgage debt and the right to call for a transfer of the consols in the trustee of sound mind resident out of the jurisdiction, and, it appearing that he was out of the jurisdiction, vested the mortgage debt and the right to call for a transfer of the consols in the new trustees. *In re* Batho - - - - C. A. 189

2. —— *Trustee incapable of acting—Paralytic—Person of Unsound Mind*—13 & 14 *Vict. c.* 60, *ss.* 2, 32.] A person who is paralytic and deprived of the power of speech and unable to read and write, but is not suffering from any mental disease, is not a person of unsound mind within the Trustee Act, 1850, s. 2. Therefore in such a case the petition should not be presented in Lunacy, but in the Chancery Division. *In re* Barber - - - - - C. A. 187

TRUSTEE RELIEF ACT—*Payment into Court—Costs—Jurisdiction.*] On applications for payment out of a fund which has been paid into Court under the Trustee Relief Act, the jurisdiction of the Court is limited to the fund which has been actually brought into Court; and repayment by the trustees of costs and expenses deducted by them from the fund before payment in cannot be ordered.—If it can be shewn that in such a case the costs and expenses have been improperly retained separate proceedings must be taken against the trustees to recover the amount. *In re* Parker's Will - - - C. A. 303

—— Service out of jurisdiction - - 424
See Practice. 6.

ULTRA VIRES ACT—Issue of shares at a discount - - - - - 190
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UNDERLEASE—Misdescription - - 110
See Vendor and Purchaser.

UNITY OF PERSON—Husband and wife - 148
See Will. 6.

VALUER—Duty to employer - - 39
See False Representation.

VENDOR AND PURCHASER—*Misdescription—Conditions of Sale—Underlease described as Lease—Condition that Misdescription shall not annul the Sale.*] Houses offered for sale were stated in the particulars to be held for ninety years from the 24th of June, 1844, at a ground rent of £21. The 4th condition provided that the title should commence "with the lease under which the vendor holds dated 11 July, 1845." The 5th condition stated that "the description of the property in the particulars is believed to be correct, but if any error shall be found therein the same shall not annul the sale, nor shall any compensation be allowed in respect thereof." The vendor was in fact entitled to an underlease for the residue of the term of ninety years less two days at a peppercorn rent, and the owner of the two days could not be found:—*Held*, by the Court of Appeal, that the representation that the property was held by lease when it was in fact held by underlease was a fatal misdescription, unless it was cured by the 5th condition, and that the 5th condition did not apply, for that "error in the description of the property" meant a misdescription of the corporeal property, not a mistake in the description of the vendor's title:—*Held*, therefore (affirming the decision of Kay, J.), that a good title was not shewn.—*Dictum* of Jessel, M.R., in *Camberwell and South London Building Society* v. *Holloway* (13 Ch. D. 760) disapproved. *In re* Beyfus and Masters's Contract - C. A. 110

VESTING ORDER—Trustee Act - - 189
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VICARAGE HOUSE—Trust for parishioners—London Parochial Charities Act - 492
See Charities. 1.

VOLUNTARY WINDING-UP - - 306, 415
See Company. 8, 9.

WILL—"*Every other Son or Sons*"—*Eldest Son excluded*—"*Begotten and to be begotten*"] A testator devised real estate to his second son for life, with remainder to his first and other sons in tail male; with remainder to the testator's third son for life, with remainder to his first and other sons in tail male; with remainder to the testator's fourth, fifth and every other son and sons to be begotten, born, or en ventre sa mère at the time of his decease, successively in tail male; with the remainder to the testator's daughters begotten or to be begotten equally as tenants in common in tail. All the testator's sons except the eldest having died without issue male the eldest son claimed the estate:—*Held* (affirming the decision of Stirling, J.), that, having regard to the various limitations of the will, the eldest son was excluded from taking under the expression "every other son."—Although the words "to be begotten" do not in their primary legal sense point to futurity, yet they will be held to do so if such an intention can be gathered from the will.—*Langston* v. *Langston* (8 Bli. (N.S.) 167; 2 Cl. & F. 194), and *In re Blake* (19 W. R. 765), distinguished. Locke *v.* Dunlop - C. A. 387

WILL—*continued.*

2. —— *Gift to a Class—Substitutionary Gift to Child of Member of Class who shall die in Testator's Lifetime—Child of Member who was dead at Date of Will.*] A testator bequeathed a residuary fund upon trust for the equal benefit of his sisters, nephews, and nieces, as to the shares of his nephews absolutely, and as to the shares of his sisters and nieces upon trust to invest the principal moneys forming their shares, and to pay the dividend to each such sister and niece for life for her separate use, and after the death of each sister to apply her share for the benefit of his said nieces equally upon the trusts of their original shares, "and after the death of each niece upon trust to pay her share to such of her children as she shall by will appoint, and in default of appointment to her children equally on attaining the age of twenty-one years, and if no such children then on trust for the survivors or survivor of my said nieces. If any niece shall die in my lifetime her share shall be for the benefit of her child or children, but if no such children who shall live to attain the age of twenty-one years, then such share shall be for the benefit of my surviving nieces equally, and upon the same trusts":—*Held*, that the child of a niece who died before the date of the will did not take.—*Christopherson* v. *Naylor* (1 Mer. 320) followed.—*In re Smith's Trusts* (5 Ch. D. 497, n.) not followed. *In re* Chinery. Chinery *v.* Hill 614

3. —— *Gift to Children of any Son of Tenant for Life—Remoteness—Tenant for Life past Child-bearing—Admissibility of Evidence.*] A testator by his will, dated September, 1866, gave all his estate to trustees upon trust to pay an annuity to his daughter (the Plaintiff) for life, and on her decease he declared that they should stand possessed of the residue of the trust funds in trust for such child or children of the Plaintiff as had attained or should live to attain the age of twenty-one years, or (being a daughter or daughters) should have attained or should live to attain that age, or have married or marry, and also for such child or children of any son of the Plaintiff who should die under the age of twenty-one, as should live to attain the age of twenty-one years, or (being a daughter or daughters) should live to attain that age or marry, and, if more than one, in equal shares and proportions as between brothers and sisters.—The testator died in January, 1875, and at his death the Plaintiff, who was then over sixty years of age, had one son and five daughters living:—*Held*, that the trust in favour of the grandchildren of the Plaintiff was void for remoteness, and that evidence was not admissible to shew that at the testator's death the Plaintiff was past the age of child-bearing.—*Jee* v. *Audley* (1 Cox, 324) and *In re Sayer's Trusts* (Law Rep. 6 Eq. 319) followed.—*Cooper* v. *Laroche* (17 Ch. D. 368) disregarded. *In re* Dawson. Johnston *v.* Hill - - 155

4. —— *Gift over—Portions—Children dying in Lifetime of Parent.*] The rule in *Howgrave* v. *Cartier* (3 V. & B. 79) in favour of putting on a settlement or will making a provision for a family such a construction as will give the children indefeasible interests on their attaining twenty-one, is only a rule of construction to be applied in

WILL—*continued.*

construing ambiguous words, and not a positive rule which will modify the effect of plain words.—A testator gave his property to his daughter for life, and then to her children, who being sons should attain twenty-one, or being daughters attain that age or marry. "And in case my said daughter shall happen to die without leaving any child or children her surviving, or leaving such they shall all die without having obtained a vested interest in the said trust moneys, and without leaving any issue them, him or her surviving," then over to two cousins. The daughter had children, some of whom attained twenty-one, but all died in her lifetime:—*Held*, that the gift over took effect, its terms being unambiguous and the event to which it referred having happened.—Decision of Kay, J., affirmed. *In re* Hamlet. Stephen *v.* Cunningham - - **C. A. 426**

5. —— *Gift to Husband and Wife—Gift while living apart—Condition and Limitation.*] A testator directed his trustee to pay to his sister M. "during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of £2 10*s.* per week for her maintenance whilst so living apart from her husband." M. and her husband were married some years before the date of the will, and never lived apart till some time after the death of the testator. The testator's son was living and an infant:—*Held*, that the bequest to M. was not to be construed as a gift to her during the joint lives of herself and her husband until the son attained twenty-one, upon a condition, which might have been rejected as against the policy of the law, that she and her husband should not live together, but as a limited gift of weekly payments to be made during a period the commencement and duration of which were fixed in a way which the law does not allow, and that the gift was void.—Decision of Kay, J., affirmed.—*Brown* v. *Peck* (1 Eden. 140) and *Wren* v. *Bradley* (2 De G. & Sm. 49) considered.—The distinction between gifts on condition and gifts by way of limitation, discussed. *In re* Moore. Trafford *v.* Maconochie - - **C. A. 116**

6. —— *Gift to Husband and Wife and Third Person—Unity of Person of Husband and Wife—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 5.] The rule of construction whereby, under a gift to a husband and wife and a third person, the husband and wife take only one moiety between them, has not been altered by the Married Women's Property Act, 1882.—A testator, by his will made in 1887, directed that a share of his residuary estate should be divided between his "sister M. B., D. B., her husband, and H. B., her step-daughter, in equal parts." M. B. and D. B. were married previously to the commencement of the Married Women's Property Act, 1882:—*Held*, that M. B. and D. B. each took one-fourth, and H. B. one-half of the share, the one-fourth of M. B. being her separate property according to the Act. *In re* Jupp. Jupp *v.* Buckwell - - - - - **148**

7. —— *Perpetuity — Remoteness — Divisible Gift.*] The will of a testatrix contained an ultimate limitation of her real estate to her right heirs in case both her daughters (for whom and their husbands and issue provision had been made by the will), should die without leaving any child or the issue of any child living at the decease of the survivor of them, or of the survivor of their respective then present or any future husbands. The personal estate was bequeathed by reference on the trusts of the real estate. Neither of the daughters married again. Each died leaving her husband surviving her, but no issue:—*Held*, by North, J., that the gift over was divisible into two distinct gifts, viz. (1) in case both the daughters should die without leaving issue living at their respective deaths; (2) in case the daughters or either of them should die leaving issue, and there should be no such issue living at the death of the survivor of the husbands of the daughters; and that, the first event having happened, the gift over was good, though it would have been void for remoteness if the daughters had left issue.—*Held*, on appeal, that the gift over was not in the alternative on the happening of either of two distinct events, but a single gift over on one event involving two things; that as the testatrix had not separated the gift the Court could not separate it, and that therefore the gift over was void for remoteness. *In re* Harvey. Peek *v.* Savory - - - **C. A. 289**

8. —— *Precatory Trust—"It is my desire that she allows."*] The doctrine of precatory trusts is not to be extended, and, in considering whether precatory words create a trust, the Court will not look only to particular expressions, but see whether on the whole will the testator's intention was to create a trust, and regard will be had to any embarrassment and difficulty which would arise from a trust.—A testatrix gave all her property real and personal to her daughter "her heirs and assigns; and it is my desire that she allows to A. G. an annuity of £25 during her life, and that A. G. shall if she desire it have the use of such portions of my household furniture as may not be required by my daughter." The daughter and her husband were appointed executors:—*Held* (reversing the decision of the Vice-Chancellor of the County Palatine), that no trust or obligation to pay the annuity was imposed upon the daughter, but that there was only a request to the daughter, not binding her in law, to make that provision for A. G. *In re* Diggles. Gregory *v.* Edmondson - - **C. A. 253**

9. —— *Satisfaction — Cotemporaneous Deed and Will.*] By a separation deed, dated the 7th of September, 1844, the husband covenanted that his executors or administrators should on his decease pay to his wife, if she survived him, £100; with a proviso that if £6 per month was paid her for six months from his death, the balance should only be paid at the end of that period. By his will, dated the 5th of September, 1844, but alleged to have been signed on the 9th, "after all my just debts, funeral and testamentary expenses are paid, I bequeath to my wife £100 payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100 as per indenture stated in our mutual separation":—*Held* (affirming the decision of Kekewich, J.), that the legacy was not in satisfaction of the sum covenanted by the deed to be

WILL—*continued.*
paid, but that the widow was entitled to both sums.—The circumstance that two documents are cotemporaneous, so that both are present to the mind of the donor when he executes each of them, is a strong reason against holding a gift in one to be a satisfaction of an obligation under the other to pay a like sum. HORLOCK *v.* WIGGINS. WIGGINS *v.* HORLOCK - - - C. A. 142

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